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Supreme Court of the United States

OCTOBER TERM, 1943.

No. 215.

ARTHUR GOODWYN BILLINGS, PETITIONER,
VS.
KARL TRUESDELL, MAJOR GENERAL, UNITED
STATES ARMY.

BRIEF FOR THE PETITIONER.

LEE BOND,
Of Counsel.

ARTHUR GOODWYN BILLINGS,
Petitioner.



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STATEMENT OF THE MATTER INVOLVED.

The petitioner registered under the Selective Training and Service Act of 1940 with the Ottawa County, Kansas, draft board, but stated on his registration card that he would never serve in the army (R. 12). With his questionnaire he filed the form provided for conscientious objectors, stating therein his reasons for opposing war and conscription. He was first put in class 1-B on account of defective eyesight, then in 1-H on account of his age, and finally (with the general reclassification which followed this country's official entrance into the war) in class 1-A. The law permitted the con-

testing of this last classification and petitioner contested it. He was accorded a hearing at which he was allowed to set forth his reasons for opposing war and conscription. [Although this was not mentioned in the testimony, petitioner asked the members of his draft board if they thought they could tell the difference between those whose rights we were fighting to protect and those whom they were willing to have killed and maimed in order to achieve "Victory." One of the members of the board expressed the view that he would recognize Japanese, Germans or Italians. Petitioner then showed the members of the board photographs he had taken abroad and had carefully selected with a view to such an experiment. They took a fat and scowling Englishman for a German; a gentle looking old German who was feeding a pigeon out of his hand for an Englishman; a slinky looking Chinaman for a Japanese; a kindly looking Japanese teaching his little girl how to ride a tricycle for a Chinese; a Finn for a Russian, and so on.] Petitioner stated, among other things, that, while he was an agnostic with regard to theology, he believed in the fundamental rightness and soundness of the teachings attributed to Jesus with regard to human conduct. He was told that his objection to war was rational rather than religious (R. 12) and was reminded that the draft law provided special treatment only for those who object to war "by reason of religious training and belief."

The board decided not to change its classification. Petitioner appealed. As in all such cases, the F. B. I. conducted an investigation. Then petitioner was called to Wichita for a hearing before Mr. Yankey, state appeal agent of the Department of Justice in cases involving conscientious objectors. Mr. Yankey, having looked over the report of the F. B. I., told petitioner that there was no question as to the sincerity of his objection, but that the question was whether it was the intent of the law to cover an objection such as your petitioner's under the

phrase "by reason of religious training and belief," petitioner being avowedly a free thinker on theological matters (R. 13). [Although this was not brought out in the evidence, Mr. Yankey seemed impressed by the fact that petitioner's was not just a personal objection to being drafted himself, but that he questioned the authority of the government to draft anybody, and by the fact that petitioner was not even certain that he would prefer a camp for conscientious objectors to (civil) prison, since he believed that he might register a more effective protest against war and conscription by being sent to prison for deliberately violating the draft law than he could by being sent to a camp for conscientious objectors in compliance with the law. After the hearing Mr. Yankey invited petitioner to dine with him and said that he was having difficulty in making up his mind what to recommend to the board of appeals. Petitioner replied that he was not sure himself whether or not it was the intent of the law to classify one with his convictions as an objector "by reason of religious training and belief."] The board of appeals sustained the classification of the local board.

Petitioner, while determined never to serve in the army, had no desire to go to prison for violating the draft law if under the terms of that law he might not be found physically fit for service in the army anyway. So petitioner, who was then teaching at the University of Texas in Austin, made inquiries of the army officers in charge of the state draft headquarters in that city as to whether he could take the final physical examination without becoming subject to military jurisdiction if he should pass the physical examination and refuse to report for induction (R. 24 and 31). He was told by these draft officials that no one was subject to trial by court martial unless he had been "actually inducted" into the army, that one was not inducted until he subscribed to the oath of induction, that the induction ceremony in which the oath was administered did not come until after the final phys-

ical examination, and that, consequently, if petitioner reported for the final physical examination, passed it, and then refused to report for induction, he would be subject to arrest and imprisonment by the civil authorities for violating the terms of the Selective Service Act. Petitioner made the same inquiry of others and received the same answer. His own examination of the Act and of the pertinent Regulations convinced him that the answer was correct.

In due time, petitioner was ordered to report to his draft board at Minneapolis, Kansas, for transportation to Ft. Leavenworth for the final physical examination and, if he passed it, for induction (R. 18). [This order was later torn up by petitioner to make it impossible for the Army to fill in the blank on the reverse side, and was submitted as an exhibit at the hearing (R. 18).] In the belief that the previously mentioned information given him by the state draft officials was correct, and in the hope that he might be found to be physically unacceptable to the army and hence be permitted to go on teaching at the University of Texas instead of being sent to prison—petitioner decided to report for the final physical examination and, if he passed it, to turn himself over to the appropriate civil authorities for arrest and imprisonment for refusal to report for induction. Petitioner's every act thereafter was in conformity with that decision.

Petitioner departed from Austin, Texas, for Kansas by airplane, but had to give up his seat at Dallas on account of military priorities, so he proceeded to Kansas City by train. Since it was too late to go to Minneapolis, Kansas, petitioner phoned his local board to find out by what bus the group from his county was proceeding to Ft. Leavenworth and to reiterate that if he passed the physical examination he was going to turn himself over to the civil authorities for arrest and imprisonment. The secretary of the draft board told petitioner over the phone that he would be reported delinquent for his failure to

report to Minneapolis (R. 18). Believing that he probably would pass the physical examination, petitioner next phoned the Kansas City offices of the U. S. Attorney, the U. S. Marshal, and the F. B. I. and told them he was going to Ft. Leavenworth to take the final physical examination and that if he passed it, he was going to refuse to report for induction, and inquired to whom he should turn himself over for arrest and imprisonment (R. 31-32).

Then petitioner went to Victory Junction, Kansas, where he met the rest of the group from his county and proceeded with them to Ft. Leavenworth. He slept overnight on the reservation and reported for his final physical examination the next morning along with the rest of the group from his county (R. 19). During the course of the physical examination he was asked if he thought he would make a good soldier and replied that he would never serve in the army (R. 20). At the conclusion of the physical examination petitioner was told that he had been put in Class 1-B and that he should go back to the checking station. Since not all the members of Class 1-B were being inducted into the army and since petitioner had left his suitcase at the checking station, he did not know whether or not he had been found acceptable. His eyes having been dilated during his physical examination he was unable to read what was written on the papers that he carried. He therefore asked a boy in overalls at the checking station what the papers said. The boy replied that, according to them, petitioner was supposed to be fingerprinted (R. 21). Petitioner inquired whether or not fingerprinting involved induction, stating that, if it did, he would refuse to submit to it and turn himself over to the civil authorities for arrest and imprisonment. The boy said that he did not know, but would find out from his superior officer. Petitioner accompanied the boy to the office of Captain Milligan and Lieut. Nemec to whom he reiterated what he had just

said to the boy, explaining that he wished to remain outside military jurisdiction. Captain Milligan said that since the army had jurisdiction over the territory of the reservation, petitioner had entered military jurisdiction as soon as he entered the reservation. Petitioner called attention to the fact that there was a provision of the draft law to the effect that a person was not subject to trial by court martial unless he had been "actually inducted into the army," and stated that he, the petitioner, would refuse to be inducted. The captain replied that petitioner could be inducted simply by reading the oath of induction in his presence and that that was what would be done (R. 22). At the suggestion of Lieut. Nemec petitioner was then put under guard to prevent him from turning himself over to the civil authorities before the oath of induction could be read to him (R. 21, 29). However, before the oath was read, Captain Milligan permitted petitioner to phone the U. S. Marshal and the U. S. Attorney—at Topeka, Kansas—to whom he explained his predicament and asked what he could do under the circumstances (R. 21-22). He was advised that the thing to do in such a case was to get a good lawyer and apply for a writ of habeas corpus. At petitioner's request the names of several lawyers were mentioned. One of the lawyers mentioned was William D. Reilly. Petitioner phoned him immediately, explaining the situation and requesting him to apply for the writ of habeas corpus. Over the phone Mr. Reilly requested the army officers to stay reading of the oath of induction until the writ could be drawn. This they refused to do (R. 22 and 33).

Shortly after petitioner had finished talking to his lawyer he was ordered to stand and raise his right hand (R. 22). This petitioner refused to do. Then, as he sat there under guard to prevent him from turning himself over to the civil authorities, petitioner was read the oath of induction: "Do you, Arthur Goodwyn Billings, solemnly swear . . . ?" Petitioner replied, "I do not; I

refuse to take this oath!" One of the officers then retorted, "That doesn't make any difference, you are in the army now." Then petitioner was ordered by Lieut. Nemec to submit to fingerprinting and, when he refused to do so, was ordered locked up for courtmartial on a charge of refusing to obey a direct order to submit to fingerprinting. Before petitioner was actually taken away to the guardhouse, however, his attorney, Mr. Reilly, arrived with the application for a writ of habeas corpus for him to sign (R. 22-23). Then petitioner, still in civilian clothes, was put in the guardhouse (R. 23).

Since August 13, 1942, or thereabouts, petitioner has been held prisoner at the Post Guardhouse at Fort Leavenworth. In October, 1942, he was charged, as if he were a soldier, with the additional offense of refusing while a prisoner to load some scrap iron. This is not recorded in the testimony because it occurred after the hearing in the District Court.

Petitioner is quite ready to bear such punishment as the civil courts may impose for his willful refusal to be inducted into or to serve in the army and, if freed from the bonds of the military authorities, would carry out his original intention of turning himself over to the civil authorities for arrest and imprisonment.

COMMENTS WITH REGARD TO OTHER STATEMENTS OF FACT SUBMITTED IN THIS CASE.

It will be noted that the foregoing statement of fact is in quite close accord with that of the certiorari Brief for the Respondent in Opposition. That these two statements would be in accord was indeed to have been expected in view of the announcement in the respondent's original brief to the District Court that:

Respondent is willing to accept the statement of facts made by petitioner with the important exception that after petitioner had refused to subscribe to the oath tendered to him, that he was then informed that he

was accepted as and was then a soldier of the United States Army.*

There were quite a few hiatuses, obscurities and inaccuracies in the typewritten copies of the stenographic record of petitioner's testimony, but in the statement of facts in the certiorari brief for the respondent there was only one sentence in which petitioner's testimony as to the facts was misinterpreted. From this sentence (p. 4) it would incorrectly have appeared that before the oath of induction was read to petitioner, and even before he was put under guard, he had been given an "order" to submit to fingerprinting and had been told that he was already "in the army." Before the events mentioned petitioner had indeed been told, by an enlisted man in overalls, that he had to be fringerprinted (R. 21) and had indeed been told, by Captain Milligan, that, being on the military reservation he, petitioner, was in military jurisdiction. But it was not until after petitioner (who already had been put under an armed guard to keep him from turning himself over to the civil authorities and had by phone retained an attorney to initiate habeas corpus proceedings) had been read, and had refused to take, the oath of induction, that he was for the first time told that he was in the army; and it was not until after this that petitioner was given the direct order (to submit to fingerprinting) with refusing to obey which, he is charged for courtmartial (R. 4). The misinterpretation above mentioned was similar to one thrice repeated by the judge of the District Court (R. 39, 45 and 49).

When these misinterpretations of petitioner's testimony, and the two hiatuses or obscurities in the type-

*As petitioner recalls it, he was told only "That doesn't make any difference, you are in the army now" (R. 22), but he would agree to the respondent's supplement to his testimony provided that the word "told" be substituted in it for the word "informed" (which might imply that what he was told was correct).

written copy of the stenographic record which had caused them, were called to the respondent's attention—he consented through his legal representatives to the two minor corrections which petitioner requested, to clear up the obscurities in the record as to these facts—so that, as it now stands printed the record of the testimony on these points (R. 21 and 22) is unambiguous.

Otherwise the terse and objective statement of facts in the Brief for the Respondent in Opposition (on the certiorari petition) was in perfect accord with the statement of your petitioner on all facts mentioned by them both. However, each statement mentioned some details not mentioned by the other. For instance, while your petitioner supplied a few minor details not included in the testimony, he did not mention in his statement the autobiographical data brought out at the hearing, but the respondent's statement contained the following excellent summary of this data:

Petitioner is thirty-two years of age (see Tr. 11). He graduated from the University of Kansas in 1933, spent two years at the University of Paris, served three years in the American Embassy in Moscow under Ambassadors Bullitt and Davies, traveled for four months in China and Japan in 1938, studied three years at Harvard University, receiving a master's degree and completing two thirds of the work toward a doctorate, and became a member of the economics faculty of the University of Texas in 1941.

(This biographical data may help to explain some of petitioner's convictions. He has with his own eyes seen some of the tragic results of the first world war "to make the world safe for democracy" and he knows perhaps a little more than does the average citizen about the background of the present war in which we fight for the "four freedoms," allied with the dictator who was so recently dividing the spoils of Europe with Hitler, with the dictator who has so long been trying to "liberate"

Finland of its democracy, with the dictator in whose country your petitioner for three years searched hope-fully and thoroughly for some evidence of growing democracy, and found instead overwhelming evidence of in-creasing suppression of the most elementary democratic rights.)

The points at which the written opinion of the Cir-cuit Court of Appeals in this case found in the 105 F. 2d, p. 505, conveys an impression at variance with the facts are listed in the first six assignments of error in your peti-tioner's certiorari brief. The testimony with regard to the facts in question is so objectively summarized in the cer-tiorari Brief for the Respondent in Opposition that further comment with regard to them here would be superfluous.

The District Court, in its Memorandum Opinion and in its order discharging the writ of habeas corpus, con-veyed an impression on many points at variance with the facts. The legitimate misinterpretation (R. 39, 45 and 49) of the faulty stenographic record of petitioner's testimony as to the sequence of events has already been mentioned. The District Court's other misinterpretations of peti-tioner's testimony were in his opinion not so legitimate. Moreover, the Court conveyed an incorrect impression by failing even to mention several important facts—for in-stance, the fact that, before the oath of induction was ever read to petitioner, he had been put under arrest to keep him from turning himself over to the civil authorities and had by phone retained an attorney to initiate habeas corpus proceedings (R. 21 and 22). In fact, petitioner feels that at the hearing, and in its Memorandum Opinion, the District Court gave every evidence of a lack of judicial objectivity. Typical of the District Court's opinion are its statements:

(1) With regard to the physical fitness of your pe-titioner for military service. According to the Judge of the District Court (R. 39):

Petitioner is a single man with no dependents. He is thirty-one years of age, six feet tall, and weighs 165 pounds. To all appearances he is a well developed, able-bodied man.

Since the court fails to mention the fact that petitioner was found physically fit only for non-combatant service (R. 15 and 21) the erroneous impression is conveyed that fear for life and limb might have had something to do with petitioner's refusal to submit to induction into the army. Actually, now and in the future, he would probably have fared much better materially by going into the army. Petitioner was given to understand by the officers who interviewed him that if he would consent to serve in the army, he might, in view of his exceptional educational qualifications, soon be a Captain (R. 33 and 34). Although this was not mentioned in the evidence, he was also told that he would not have to serve outside the continental United States.

(2) With regard to the nature of petitioner's objection to war. According to the Judge of the District Court (R. 39):

It appears that instead of being a conscientious objector under the regulations and the law, petitioner is an agnostic, as found by the draft board.

As Captain Browne correctly pointed out (R. 8), the law provides special treatment only for those who object to war "by reason of religious training and belief" and the failure of the draft authorities to put petitioner in Class 4E did not constitute a finding that petitioner was not a conscientious objector at all. In fact, Mr. Yankey, the state appeal agent of the Department of Justice in cases involving conscientious objectors, after looking over the reports of the F. B. I. concerning petitioner, said that there was no question as to the sincerity of petitioner's opposition to war (R. 13). As for the fact that petitioner is an agnostic, the draft board had no occasion to "find" this; petitioner volunteered the information.

(3) With regard to petitioner's allusion to Socrates. According to the Judge of the District Court (R. 40) petitioner "likens himself to Socrates." This might convey the impression that petitioner had boastfully likened his abilities to those of the great Greek philosopher. But such was not the case. (Petitioner's allusion to Socrates came in answer to the Court's question as to why petitioner wished to submit to trial in any court. Petitioner understood the court to imply that since he was disobeying the law he should, to be consistent, try to evade punishment. In attempting to explain his attitude on this matter, petitioner cited the example of Socrates who, rejecting the opportunity to evade the death penalty by fleeing from his prison at night, stayed and drank the hemlock. That was the only sense in which petitioner "likened himself to Socrates" (R. 25).

(4) With regard to petitioner's refusal to obey the draft law. According to the Judge of the District Court (R. 40), petitioner "refuses to conform to or abide by any law of the United States that does not suit his whim." It would be interesting to know how the Judge would have attempted to reconcile his statement with the fact that up to the present instance petitioner had never been arrested for, or charged with, the violation of any law of the United States or any subdivision thereof. Petitioner did state (R. 17) that there are certain limits beyond which no government, even a democracy, has any right to go infringing upon the rights of the individual, that "no government has the right to make him a slave, to make him commit murder," and that this was what the government was ordering him to do, to kill people, or since he would be just a non-combatant, to serve as an accomplice in the murder of people whom he had never even met, of people whom he might like, if he knew them, as well as he does many of the people of this country. It is something far deeper and far stronger than

a mere "whim" which has made the petitioner refuse to submit to induction into the army.

The Judge of the District Court further characterizes petitioner's attitude as follows:

The spirit of petitioner is one of rebellion against the laws of the United States, against his government. The effect of his action and those of others like him is to hinder the war effort the government deems necessary in this distressing emergency. . . The purpose and effect of such an attitude would be so plain that it would be impossible not to conclude that such citizens were at heart traitors to their country.

The District Court has this to say of those who themselves refuse to obey the conscription law, but refrain from counseling others to do so. It would be interesting to know what the Judge of the District Court would have said of Daniel Webster who, on December 9, 1814, when the country was in far more imminent peril than it is today, in Congress said the following with regard to conscription:

. . . In my opinion it ought not to be carried into effect. The operation of measures thus unconstitutional and illegal ought to be prevented by a resort to other measures which are both constitutional and legal. It will be the solemn duty of the State Governments to protect their own authority over their militia, and to interpose between their citizens and arbitrary power. These are among the objects for which the State Governments exist; and their highest obligations bind them to the preservation of their own rights and the liberties of the people. I express these sentiments here, sir, because I shall express them to my constituents. Both they and myself live under a constitution which teaches us that the doctrine of non-resistance against arbitrary power and oppression is absurd, slavish, and destructive of the good and happiness of mankind. With the same earnestness with which I now exhort you to forbear these measures, I shall exhort them to exercise their unquestionable

right of providing for the security of their own liberties (see Appendix).

The formula which the District Court applies to your petitioner would have made Daniel Webster "at heart a traitor to his country." Further comment with regard to the formula is superfluous.

(5) With regard to your petitioner's opinion as to the Pearl Harbor attack. The Judge of the District court (R. 47) misrepresents petitioner as saying that "Japan was justified (partly) in such treacherous attack." But what petitioner actually said was this (R. 15):

I think this was very treacherous on the part of the Japanese. However, I think that it was not without a certain amount of provocation from their point of view, because Secretary Knox a month before had boasted that American Army fliers on leave from the Army Air Corps were dropping American made bombs from American made planes on the Japanese in China. When we were fighting in Nicaragua, if Tojo had boasted that Japanese fliers were dropping Japanese made bombs from Japanese made planes on the American troops in Nicaragua, I believe we would have regarded it as a pretext or cause for war.*

It might be added that last Fall our own government staged a surprise attack all too reminiscent of Pearl Harbor, on the North African colonies of France. Under the cloak of normal diplomatic relations with the Vichy government we stealthily whetted the dagger of invasion, and in the worst Japanese tradition, announced the blow to Vichy after it had been struck. Of course, it must be remembered that we really came as friends of the French people, but it must not be forgotten that the Japanese claim, and have

*In the stenographic record of this statement (R. 15) there are several errors. In particular the word "army" appears twice where the word "American" should be and the word "perfect" appears where the word "pretext" should be.

found people in Burma and the Philippines who give the appearance of believing that it is the purpose of the Japanese army to "liberate" the Far East from "white domination." It is easy for a nation to see the mote in an enemy eye but difficult for it to perceive the beam in its own.

(6) With regard to petitioner's willingness to serve his country. According to the Judge of the District Court (R. 47):

We like to believe that when danger threatens the country every individual citizen will come forward immediately and do his duty. Not so with this petitioner . . . it is difficult to understand how such apparent disloyalty could abide in the soul of a human being, . . .

From this the erroneous inference might be drawn that petitioner would not voluntarily serve his country. At the hearing in the District Court petitioner said, in answer to one of the Judge's insults (R. 37):

Sir, I am willing to do anything to help my country, but I don't think it helps my country to promote this war.

Petitioner meant exactly what he said. He is willing to do anything to help the country, but he refuses to prostitute his knowledge and talents for an endeavor which he believes to be harmful to humanity in general and his country in particular, an endeavor as wrong in principle as is wholesale and indiscriminate murder. In petitioner's opinion the war will be no more beneficial to his country than a feud would be to his family. But just as the father of a feuding family might draw the erroneous conclusion that any son who would not lend a hand in the indiscriminate murder of people who happened to have been born in the opposing family, so the Judge of the District Court apparently draws the conclusion that any American is disloyal who refuses to assist in the indis-

criminate murder of the men, women, and children who happen to have been born in the countries with which this country is at war. The son of a feuding family who resisting the folly of his parents, seeks means to bring about a reconciliation with the opposing family, may be serving his family better than the equally well-meaning son who, at the risk of his own life, "satisfies the family honor" by revenge, and thereby stirs up new hatreds in the opposing family which may in turn result in the murder of further members of his own family; likewise the citizen who resists the folly of his government. As Confucius is reported to have said:

When the command is wrong, a son should resist his father, and a minister should resist his august master. The maxim is, 'Resist when wrongly commanded' (from the Hsio King).

Petitioner urges the following assignments of error being part of the ones set out in his Petition for Certiorari:

6. In asserting (p. 6) that petitioner actually did report "for induction."

7. In ruling by inference that the military authorities had not exceeded their rights when, before the oath of induction had even been read to petitioner, they put him under guard to prevent him from leaving the military reservation and from turning himself over to the civil authorities for arrest and imprisonment (for refusal to report for induction).

8. In ruling by inference that it was not even a violation of the Selective Service Act for petitioner to refuse to be inducted into the army.

9. In ruling (p. 6) that induction was completed when the oath was read to petitioner and he was told that he was inducted into the army.

10. In ruling by inference (p. 6) that the military authorities may by their unilateral action seize a man still in

civil jurisdiction who refuses to be inducted into the army, and drag him across the induction boundary into military jurisdiction, that they may by their unilateral action deprive a citizen of his rights under the 5th and 6th amendments to the Federal Constitution in spite of anything that the citizen may do or say.

11. In failing to rule that to induct petitioner into the army (except in punishment of crime) would be to subject him to involuntary servitude in violation of his rights under the 13th amendment.

12. In affirming the decision of the District Court that the military authorities had jurisdiction over petitioner, and that he was subject to trial before a court martial.

13. In sustaining the decision of the United States District Court that petitioner had been inducted into the United States Army.

DIRECT ARGUMENT.

I.

Petitioner is punishable in civil courts for his deliberate violation of the Selective Training and Service Act of 1940 and of Executive regulations having the force of law.

In the Selective Training and Service Act of 1940 and in regulations having the force of law the federal government laid out a path for certain categories of citizens to follow from civilian life into the army, and made each step along this path, beginning with registration, compulsory—the compulsion consisting in the threat of punishment by civil courts for failure to take any step up to and including induction, and in the threat of punishment by court martial for failure to take any step after the completion of induction. Congress set forth these threats of punishment in Section 11 of the Act (50 U. S. C. 311) and, by providing that “no person shall be tried by any military or naval court martial in any case arising under this act unless such person has been actually inducted for the training and service prescribed,” clearly drew the boundary line between persons subject to civil jurisdiction and persons subject to military jurisdiction, making subject to the latter only those selectees the induction of whom had been completed.

Because of its effect induction would thus appear to be one of the most important steps prescribed by the Act. The selectee who has not taken this step is still a civilian, subject to the jurisdiction of the civil courts, but the man who has taken the step is a soldier subject to the jurisdiction of court martial.

The very word “induction” indicates that it is a step which is to be taken by the selectee and which cannot be taken for him. It means literally the process of lead-

ing (into), and, as used in the Selective Service Act, it indicates a process whereby the selectee is led, not dragged, into the army, taking the step himself, albeit under the leadership of an officer and under the threat of punishment set forth in Section 11 of the Act for refusal to take it. The official definition of the word is in conformity with its literal meaning. According to the Federal Register (Vol. 5, No. 187, p. 3780, par. 102), "Induction is the process by which the men selected for military service pass from the status of civilians to the status of members of the armed forces." The use of the active voice, of "pass," not "are passed," clearly implies that, if taken at all, the step of induction is to be taken by the selectee himself and not by somebody else.

The provisions for induction—detailed in Mobilization Regulation 1-7, par. 13e, and in Article of War 109 as interpreted by the highest judicial authority—bear witness to the importance of induction by making it the only step in which the selective service procedure the taking of which is solemnized by a ceremony, and confirm the impression given by the very meaning of the word that the step is to be taken by the selectee and cannot be taken for him. Mobilization Regulation 1-7, par. 13e, provides that the induction (i. e., the leading of the men into the army) will be performed by an officer "in a short ceremony in which the men are administered the oath, Article of War 109." Article of War 109, in turn, prescribes that every soldier shall "take" the oath at the time of his enlistment and—in language reminiscent of the previously-cited official definition of induction—the Supreme Court has held (*U. S. v. John Grimley*, 137 U. S. 636) that "the taking of the oath of allegiance is the pivotal fact which changes the status of the recruit from that of civilian to that of soldier."

The threat of punishment for failure to take any of the prescribed steps of the selective service procedure was insufficient to intimidate your petitioner into taking the crucial step of induction. He refused to take the step

which would have changed his status from that of civilian to that of soldier, refused to take the oath of induction, and did not even report for induction. Having refused to take the step which would have changed his status, petitioner remains a civilian, but by the same token he has violated the law and is therefore subject to the punishment threatened in Section 11 of the Selective Training and Service Act. It matters not whether the charge be refusing to report for induction or refusing to submit to induction, they both amount to the same thing, and there is sufficient evidence in petitioner's own testimony at his habeas corpus hearing to convict him in a civil court on either count.

II.

No military official is authorized by Mobilization Regulation 1-7, Par. 13e, to arrest and drag into the Army a civilian who refuses to be inducted.

The respondent does not deny that petitioner refused to take the step which would have changed his status from that of civilian to that of soldier, but contends in effect that the Army, having captured petitioner on the military reservation, had the authority to hold petitioner under arrest and by its unilateral act to change his status from that of civilian to that of soldier, and thereafter to courtmartial him for refusing to obey military orders. This contention is based primarily on the provisions of Mobilization Regulation 1-7, Par. 13e, and in particular on the last sentence of section (4). The relevant provisions of this Regulation are as follows:

e Induction Ceremony—

- (1) All men successfully passing the physical examination will be immediately inducted into the army. The induction will be performed by an officer in a short, dignified ceremony in which the men are administered the oath, Article of War 109:

* * * * *

(4) They will be informed that they are now members of the Army of the United States and given an explanation of their obligations and privileges. In the event of refusal to take the oath (or affirmation) of allegiance by a declarant alien or citizen he will not be required to receive it, but will be informed that this action does not in any way alter his obligation to the United States.

The Article of War involved in section (1) of the Regulation cited reads as follows:

Act 109 Oath of Enlistment—At the time of his enlistment every soldier shall take the following oath (or affirmation): "I, _____, do solemnly swear (or affirm) that I will bear true faith and allegiance to the United States of America; that I will serve them honestly and faithfully against all their enemies whomsoever; and that I will obey the orders of the President of the United States and the orders of the officers appointed over me, according to the rules and Articles of War." This oath may be taken before any officer.

It will be recalled that, in interpreting this oath requirement of the Articles of War the Supreme Court held in *U. S. v. John Grimley* (137 U. S. 636), that

"The taking of the oath of allegiance is the pivotal fact which changes the status of the recruit from that of civilian to that of soldier."

In the light of this ruling and of the provisions of Mobilization Regulation 1-7, par. 13e, and of Article of War 109, an examination may be made of the respondent's contention that section (4) of the Regulation authorizes the Army, after it has captured a civilian selectee on its reservation, to hold him under arrest, and, when he refuses to be led (inducted) into the Army, legally to drag him in by reading the oath of induction in his presence and telling him, when he refuses to take the oath, "That doesn't make any difference, you are in the army now." Section (1) of the Regulation provides that

the men are to be "inducted," i. e., led, taking the step themselves (not dragged) into the army in a ceremony in which they are "administered" (not just read) the oath, "Article of War 109." This Article, in turn, provides that every man shall "take" (not just be read) the oath at the time of his enlistment, and it will be noted that by the ruling in the Grimley case it is the "taking" of the oath (not the reading of it by somebody else) that changes the status of a man from that of civilian to that of soldier.

An examination may now be made of Section (4) of the Regulation. "They," as used in the first sentence of this section, clearly refers to the men to whom the oath has been "administered" in accordance with the provisions of Section (1) of the Regulation and of Article of War 109. "They" to whom the oath has been administered in accordance with these provisions and who by "taking" the oath, have, under the ruling in the Grimley case, changed from the status of civilian to that of soldier—"they" are informed that "they" are now members of the Army.

But "he," as used in the second sentence of section (4), "he" to whom, because he has refused to take it, the oath has not been administered in accordance with the provisions of Section (1) of the Regulation and of Article of War 109, he who has refused to be led (inducted) into the Army, refused to take the step which, according to the ruling in the Grimley case, would have changed his status from that of civilian to that of soldier—he will not be required to take it (no physical violence will be used to attempt to make him take it), but instead of being informed like the others that he is now a member of the Army of the United States, he who has not become a member of the Army will be informed that his refusal to take the step which would have made him a soldier "does not alter in any respect his obligation to the United States."

Similar information could be given to a person refusing to do anything else that was obligatory. Refusing to stop at a red light does not alter in any respect a driver's obligation to stop, and he may therefore be punished for refusing to do so. If a man liable to the payment of federal taxes put his resources beyond the reach of the government and then refused to pay his taxes he might be informed in the very words of the above quoted regulation that "this action does not alter in any respect his obligation to the United States" and that he is therefore subject to such punishment as the courts may impose for his refusal to fulfill the obligation. For like reason your petitioner is punishable in civil courts for his refusal to fulfill the obligation imposed by the Selective Training and Service Act.

It is barely conceivable, in petitioner's opinion, that the last sentence in section (4) might without excessive violence to the intent of the Regulation be applied to a selectee who would not refuse to be inducted into the Army, but who would refuse to take the step in the particular form of an oath or an affirmation—although in view of the specific provisions for the "taking" of the oath it is unlikely that the Regulation was intended to apply in such cases. But to read into Mobilization Regulation 1-7, par. 13e, what the respondent contends is arbitrarily to read into it something that simply is not there. Mobilization Regulation 1-7, par. 13e, neither explicitly nor implicitly authorizes the army, after it has captured a civilian selectee on its reservation, to hold him under arrest and, when he refuses to be led (inducted) into the army, legally to drag him in by reading the oath of induction in his presence and telling him, when he refuses to take the oath, "That doesn't make any difference you are in the army now."

III.

Even if some executive regulation had specifically authorized the army without a sworn warrant to arrest a civilian selectee who had refused to report for or to submit to induction, and by its unilateral action to change the selectee's status from that of civilian to that of soldier and thereafter to courtmartial him for refusing to obey military orders—such a regulation would have been in direct conflict with a provision of the Selective Training and Service Act, and therefore null and void.

By providing in Section 11 of the Act that "no person shall be tried by any military or naval court martial unless such person has been actually inducted for the training and service prescribed" Congress clearly prohibited the trial by court martial of anyone who had not been actually inducted, of anyone who had not assumed the status of a soldier.

The purpose of this prohibition would obviously be defeated if the Army were permitted to arrest a civilian selectee who had refused to be inducted, and by its unilateral act to "induct" him—for this would amount to permitting the army, by its unilateral act, to subject a man whom it was prohibited from courtmartialing to a process which would permit it to courtmartial him, and any executive regulation which might have had this effect would consequently have been null and void.

The mere fact that petitioner happened to be on a military reservation at the time of his arrest did not in any relevant respect increase the authority of the army over him. The status of a civilian selectee on a military reservation under the provisions of the Selective Training and Service Act is comparable to that of an American citizen in China under the old extra-territorial treaties. The Selective Training and Service Act expressly prohibits trial by courtmartial of any person who has not been "actually inducted" into the Army, but permits the

trial by courtmartial of a former civilian has been "actually inducted" into the Army. The old extra-territorial treaties prohibited trial of American citizens by Chinese courts, but permitted the trial by Chinese courts of former Americans who had become naturalized citizens of China. Now, suppose that the Chinese government had arrested an American citizen who had refused to become a Chinese citizen and, by its unilateral act, against the American's unceasing protest, had "naturalized" him a Chinese citizen, and had then given him an order to kowtow to the emperor, an order which he had refused to obey. It would be absurd for the Chinese government to say that the American was not being kept in confinement for any act committed prior to his "naturalization," but for his continued refusal to obey a lawful Chinese order to kowtow to the emperor, and it is equally absurd for the Army to assert that petitioner "is not being kept in confinement for any act committed prior to induction, but for his continued refusal to obey a lawful military command to be fingerprinted" (Respondent's certiorari brief p. 10). The Chinese government would obviously have violated the terms of the extra-territorial treaty, and the Army has just as obviously violated the terms of the Selective Training and Service Act.

The army, having exceeded its authority under the Selective Training and Service Act, is unlawfully holding your petitioner for courtmartial.

IV.

Even if the terms of the Selective Training and Service Act had permitted the issuance of an Executive Regulation authorizing the army: without a sworn warrant to arrest a selectee, to deprive him of his right to trial by jury, and to put him into involuntary military servitude—such a Regulation would have been unconstitutional on at least three counts, and therefore null and void—unless such Regulation applied only to selectees who prior to

their arrest by the military authorities had implicitly waived their Constitutional rights as civilians by themselves assuming, freely or under legal threat of punishment, the conflicting obligations of soldiers, as set forth in the oath of enlistment.

Your petitioner does not here challenge the Constitutionality of the Selective Training and Service Act or of the Executive Regulations issued pursuant thereto as he interprets them. He does not here challenge the power of Congress to make refusal to take any step in the Selective Service Procedure a crime punishable by fine and imprisonment. It is a principle that has, rightly or wrongly, been firmly established by the Supreme Court decisions, that Congress may, by compulsion, in the form of a threat of fine and imprisonment, induce (or attempt to induce) men to take upon themselves the obligations of soldiers and thereby to renounce their conflicting rights as civilians.

What your petitioner does contend, however, is that if the Army had, from any source, received authorization for the fascistoid procedure which it used, or attempted to use, against him—that authorization would have been unconstitutional on at least three counts:

(1) In the Fourth Amendment to the Constitution freedom from arbitrary arrest is guaranteed. This amendment reads as follows:

The right of the people to be secure in their persons, houses, papers, and effects, against unlawful searches and seizures shall not be violated, and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the places to be searched, and the persons or things to be seized.

In violation of his rights under this amendment your petitioner was unlawfully, without a warrant, seized by the respondent's subordinates and put under an armed

guard to prevent him from leaving the military reservation and turning himself over to the civil authorities before the Army authorities could stage the high-handed procedure which they euphemistically call "induction."

It might be argued that seizure of a person in *flagrante delicto* is an exception to the rule requiring a warrant for arrest, but this argument is not open to the respondent, for to argue this would be to admit that petitioner had been arrested for an offense not punishable by court-martial, since the brazen "ceremony" by which the Army claims it "actually inducted" your petitioner did not take place until after petitioner was put under arrest.

(2) In Article III, Section 2, paragraph 3, of the Constitution, the rule is laid down that "The trial of all crimes except impeachment shall be by jury. . ." The Sixth Amendment repeats this rule by providing that "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury . . ."

An exception to this rule of trial by jury was perhaps implied by the following provisions of the Sixth Amendment with regard to indictment by Grand Jury:

No one shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger . . .

However, if an exception to the rule of trial by jury was implied by this Amendment, it was even more clearly implied that trial by jury was to remain the rule, and trial by court martial—a narrowly circumscribed exception, an exception which at the time of the adoption of the Amendment, could have applied only to an army composed solely of volunteers who, by voluntarily assuming the obligations of soldiers, had presumably waived any conflicting rights which they might have had as civilians.

It was certainly not the intent of the framers of the Constitution to give Congress the power to abolish the rule of trial by jury and to make a rule of the exception of trial by courtmartial. It was certainly not the intent of the framers of the Constitution to give Congress the power by its unilateral act to induct some or all of the citizens of the United States into the Army "by operation of law" (R. 45), and thereby to deprive them of the protection of the Bill of Rights, for to give Congress such a power would be to give it the power to make a mockery of the entire Constitution and to convert our government from a democracy into a military tyranny under which the citizens would have no more rights than slaves. Not having this power itself Congress could not constitutionally have conferred it upon the Army.

So your petitioner could not have been, and hence was not, "by operation of law," inducted into the army and thereby deprived of the right to trial by jury which, even under the legal threat of punishment, he had refused to give up. Unlawfully and in violation of his Constitutional rights he is being held for courtmartial as if he were a soldier.

(Your petitioner would respectfully suggest that, at a time when the possibility of "total conscription" has already been seriously mentioned in Congress, the responsibility of the Supreme Court for reserving to the citizens of this country, the protection of the Bill of Rights, except where they themselves waive this protection by submitting to induction, is of the utmost gravity.)

(3) In the first paragraph of the Thirteenth Amendment the rule is laid down that:

Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction.

If your petitioner had explicitly (by taking the oath of induction) or implicitly (by conducting himself as if

he had taken it) taken upon himself the obligations of a soldier, it might reasonably be held that he had thereby himself renounced his conflicting civilian rights under the Thirteenth Amendment. But your petitioner did not take the oath of induction, and did not at any time conduct himself as if he had taken it. He refused, even under compulsion in the form of the legal threat of fine and imprisonment, to take upon himself the obligations of a soldier and thereby to renounce his conflicting rights as a civilian.

Surely, in view of the language of the Thirteenth Amendment, it could hardly be denied that a prisoner at hard labor is presumably in involuntary servitude.

Your petitioner, confronted with the limited alternative of either doing what the draft law would require of him or of being subjected to involuntary servitude in a civil prison, as a punishment for the "crime" of refusing to do what the draft law would require of him, has demonstrated by his choice of the latter that what the draft law prescribes would be for him involuntary servitude still more reprehensible than involuntary servitude in prison. It follows that it would have been a violation of your petitioner's rights under the Thirteenth Amendment to have put him into the Army (except in punishment of crime) and that he was not lawfully inducted into the Army.

This is not the first time that the issue of involuntary servitude has been raised in connection with the application of conscription. But in the cases previously decided the contention has been that, under the provisions of the Thirteenth Amendment, conscription was unconstitutional in principle. The Supreme Court has, rightly or wrongly, refused to sustain so far-reaching a contention, and no such contention is repeated here. Your petitioner repeats that he does not challenge the power of Congress by compulsion, in the form of a threat of fine and imprisonment, to induce, or to attempt to induce, men to take

upon themselves the obligations of soldiers. He does not here challenge the power of Congress to make refusal to take any step in the selective service procedure a crime punishable by fine and imprisonment. All that petitioner contends on this point is that under the provisions of the Thirteenth Amendment, the Army cannot constitutionally drag into involuntary military servitude a man who absolutely refuses to be inducted and who is ready to suffer such punishment as a civil court may inflict for his refusal to be inducted. No previous Supreme Court decision has any direct bearing on this contention.

Moreover, the question of whether a man drafted into the Bolshevik, American or Nazi armies is in voluntary service or involuntary servitude is *not a question of law which could with justice be decided by any court once and for all*. As the derivations of the words voluntary and involuntary themselves suggest, this is a question of fact which cannot be resolved without reference to the will (*volonté*) of the individual involved. For one German patriot what the Nazi draft law requires might appear to be voluntary service, the performance of a patriotic duty—but for an equally patriotic German who is convinced that war is a wrong and self-defeating means of attempting to defend the “rights and honor” of his nation, what the same Nazi draft law requires would certainly be involuntary servitude to which he would feel it his patriotic duty to refuse to submit, even though such refusal might cost him his very life. An analogous proposition would hold for other countries including our own.*

Several decisions (in addition to those already mentioned) may be presented in support of the foregoing arguments:

In the case of *United States v. Powell*, (38 Fed. Supp. 185) the court made the following statement:

*See in the Appendix Daniel Webster's remarks on the question of whether or not conscription is constitutional.

The function of the writ of habeas corpus is to release a person unlawfully restrained of his liberty. Submission to that restraint under protest as in the case at bar obviously should not deprive one of that right. That the petitioner should subject himself to charges of desertion at the instance of the military authorities in order to preserve his inherent right to release from unlawful restraint upon habeas corpus is a requirement far too exacting to be projected into this field of the law without direct authority therefore.

We do not think that Filomio's conduct constituted a waiver of civil relief; he submitted with unequivocal protest; he refused to take the oath of induction and we conclude that he could not have more peremptorily demonstrated his objections without forcibly resisting induction—this he was not required to do.

In the case of *Stone v. Christensen* (36 Fed. Supp. 739) Stone refused to register for the draft and asked for a declaratory judgment to the effect that he need not register, the grounds being that "registration will subject Stone to military training and he will thereby be deprived of liberty and property without due process of law and that he will undergo involuntary servitude, in derogation of the Federal Constitution, and will suffer damage thereby." The court held:

... If he had registered he would not be subject to military law nor liable to court martial until after induction, which includes swearing allegiance. Prior to that time he is still entitled to protection of any rights he may have by the civil tribunals. . .

In the case of *VerMehren v. Sirmeyer*, 36 F. 2d 876, the petitioner registered for the draft on June 15, 1917. He claimed exemption, which was not allowed, and was finally ordered up for physical examination. He was never notified of the result of the physical examination—at least the notice never reached him—and the notice was not such as required by the regulations. Petitioner failed to appear for entrainment. Charges were preferred

against him before a general court martial and in October, 1918, he was found guilty of desertion, was sentenced to be dishonorably discharged and confined at hard labor for thirty years. While waiting to be transported to his place of confinement he escaped from the guard, and in 1929 voluntarily surrendered himself to the commanding officer at Fort Des Moines, Iowa, and immediately filed a petition for writ of habeas corpus. The writ was dismissed and appeal taken to the Circuit Court of Appeals of the Eighth Circuit. In the opinion of the court is the following at pages 881-882:

The induction of a civilian into military service is a grave step, fraught with grave consequences. It means, among other things, that he is subject to military law instead of to the ordinary common and statutory law. A new status is taken on; he becomes a soldier; new responsibilities are assumed; failure to strictly meet those responsibilities is followed by extreme punishment. All this is quite right and necessary, and meets no criticism at our hands. But what we emphasize is the necessity that all the steps prescribed by statute, and by regulations having the force of law, shall be strictly taken before it can be held that a person has been lawfully inducted into the military service. In the case at bar those steps were not taken.

We therefore hold that petitioner was never lawfully inducted into the military service; that the court-martial had no jurisdiction to try him as a deserter; that its judgment was void; that the District Court erred in not granting the writ of habeas corpus and discharging the petitioner. The order of the District Court is accordingly reversed, with directions to grant the writ of habeas corpus and discharge the petitioner.

In the case of *United States v. Collura* (not yet reported), decided on March 3 in the District Court for the Southern District of New York, the question of whether reporting at an induction station necessarily constituted reporting for induction was involved. Collura reported

at an induction station but balked when it became apparent that he would soon have to be vaccinated. He said that he was not going any further unless the Army guaranteed not to vaccinate him. The Army would give him no such guarantee so he refused to proceed any further. He was charged by the CIVIL authorities with refusing to report for induction. In his defense he contended that he had reported for induction, that his refusal to submit to induction was only conditional, and that he would submit to induction if the army would guarantee not to vaccinate him. However Collura was convicted of refusing to report for induction, and on March 3, 1943, was sentenced to three years in prison by Judge Henry W. Goddard (Collura appealed but no decision has as yet been handed down).

Now if even the *CONDITIONAL* refusal of Collura (after he had reported at the induction center) to submit to induction was punishable in a civil court, then your petitioner's *UNCONDITIONAL* refusal to submit to induction ought surely to be.

V.

(Tentative argument not presented to the lower courts.)

Prior to the time when petitioner came to Ft. Leavenworth to take the physical examination, the draft authorities may have committed an error of law in failing to put him in Class 4E.

Although the fact that your petitioner is earnestly opposed to war and conscription has been manifested both by his statement at the habeas corpus hearing and by his actions (e. g., refusing to be inducted into or to serve in the army and refusing, even as a prisoner, to load scrap iron)—and although the fact that the petitioner is a conscientious objector was mentioned (R. 6) in the reply, submitted for him by his attorney, to the respondent's

return to the writ of habeas corpus—conscientious objection “by reason of religious training and belief” was not presented by him as a legal ground for granting his petition for a writ of habeas corpus. The legal grounds which he did present are, he is convinced, more than sufficient to warrant his release from the hands of the military authorities into the hands of the civil authorities. Moreover your petitioner was not, until recently, aware that a court might consider conscientious objection (of the type specified in the law) as a ground for the issuance of a writ of habeas corpus. He had presumed that the classification of the draft authorities was not subject to review in the court.

However, in the recent case of *United States ex rel. Phillips v. Col. Downer* (135 F. 2d 521), a man holding ethical and humanitarian views strikingly similar to those of your petitioner, was released from the hands of the military authorities on the ground that he was, within the meaning of the law, a conscientious objector, “by reason of religious training and belief.” Reversing the order of the District Court to quash the writ of habeas corpus, the Circuit Court of Appeals ruled that it was an error of law to deny Phillips classification as a conscientious objector.

Subsequent to the time when Phillips reported for the final pre-induction physical examination the facts in his case appear to differ from those in your petitioner's case in the following respects: Phillips was found physically fit for combatant service, whereas your petitioner was found physically fit only for non-combatant service; Phillips reported for and consented to submit to induction whereas your petitioner attempted to turn himself over to the civil authorities for arrest and imprisonment for refusal to report for induction and, after being put under guard, refused to submit to induction; Phillips consented to obey orders given to him as a soldier, whereas your petitioner refused to obey any order given to him

as if he were a soldier, even the trifling order to submit to fingerprinting, and refused to obey an order given to him as a prisoner to load some scrapiron. In these respects it would appear that the evidence of conscientious objection is more conclusive in your petitioner's case than in the case of Phillips.

Yet under the ruling of the Circuit Court in the *Bowles* case (3 Cir., 131 F. 2d 818), it appears that if Phillips had refused to report for or submit to induction the court might have refused even to consider the question of whether or not he was a conscientious objector within the meaning of the law. This ruling, seems to your petitioner, unreasonable, for it would appear to require that, before a man's claim to conscientious objection could ever be heard by the court, the objector must first prove to the court that his objection has not been strong enough or of such a nature as to cause him to refuse to comply with the law.

So much for the question of whether or not the court could consider a claim to conscientious objection of the type specified in the law as an additional legal ground for the issuance of a writ of habeas corpus in the present case. Assuming that the courts could consider it, there is considerable evidence in the record of your petitioner's actions and of his testimony which might be presented in support of such a claim.

The law provides special treatment only for those conscientious objectors who are opposed to war "by reason of religious training and belief." Interpreting the words quoted differently, honest men fully familiar with the background and convictions of your petitioner might differ on the question of whether or not he should be put in this category, and petitioner himself has had some doubt as to whether or not it was the intent of the law to classify an objector like himself as an objector "by reason of religious training and belief." Like most of the other members of the Humanist wing of the Unitarian

church your petitioner is an agnostic. No organization to which he belongs has prescribed the stand which he has taken. He has taken it of his own accord. At the hearing before his draft board he was told that his objection to war and conscription was rational rather than religious (R. 12), and if the word "religious" is narrowly interpreted, that is true.

However if the word "religious" is interpreted broadly, as it was in the case of *United States v. Kauten* (2 Cir., 133 F. 2d 703), your petitioner would contend that his objection to war and conscription is both rational and religious. In the *Kauten* case (at p. 708) the court found the language of the law on this point to refer to a belief "finding expression in a conscience which categorically requires the believer to disregard elementary self-interest and to accept martyrdom in preference to transgression of its tenets."

It should be fairly evident that your petitioner did disregard elementary self-interest and put himself in for severe punishment and sanctimonious vituperation when he refused to submit to induction, refused to obey orders given to him as if he were a soldier, and refused even as a prisoner to load scrapiron. He would have run no great risk by going into the Army, for he not had been found physically fit for combatant service. Moreover, he was given to understand by the officers who interviewed him at the guardhouse that, in view of his exceptional educational qualifications, he would probably be an officer in a very short time, if he would consent to serve in the army (R. 33-34). These facts are recorded in the testimony of the hearing. For a cynic or for one not conscientiously opposed to war the easy way would obviously have been to go into the Army, but that way was absolutely out of the question for your petitioner.

Your petitioner would submit that his refusal to take the course which self-interest indicated, bears witness to the conscientiousness of his objection to what he was ordered to do.

The general nature of petitioner's objections to war and conscription has been indicated by his actions (refusal to submit to induction into or service in the army and refusal even as a prisoner to load scrap iron), by his testimony at the habeas corpus hearing (in particular R. 12-17), and by remarks scattered through this brief. However he feels that there are several points on which he should make his attitude more clear:

(1) Even if your petitioner favored war, he would oppose conscription. Under such a system the power to make war is divorced from the responsibility for fighting the war. While a majority of the populace enriches itself out of this war, the able bodied young men of the country are asked to risk life and limb at fifty dollars a month in a war which they had nothing to do with causing, for a "victory" which many of them will never live to see, for a victory the fruits of which will be bitter indeed to their widows and orphans or to their old-maided sweethearts, as the case may be. The only form of conscription in which the power to decide upon war would be associated with the responsibility for fighting it would be one wherein a referendum on war was held, with the provision that all those who voted for war would thereby volunteer to serve in the front line trenches and to put their entire fortunes at the disposal of the government.

In your petitioner's opinion if the populace of a country decides upon war they should be willing either to volunteer or to tax themselves sufficiently to pay salaries which will induce others to volunteer, and if it turns out that the highest salary which the taxpayers are willing to pay is insufficient to make men willing to volunteer, it would appear to follow logically that the populace, all considered, is not willing to wage war, and Congress should govern itself accordingly.

Although believing conscription for war to be wrong in principle, petitioner (rejecting the thought of incon-

sistently taking one of the many draft exempt war jobs for which he was well qualified), reluctantly followed the path laid out by the Selective Training and Service Act until there was absolutely no alternative but to go into a non-combatant branch of the Army or to refuse to do so and take the consequences.

If one may judge from the Speech on the Conscription Bill, cited in the Appendix, Daniel Webster would have violated the law more flagrantly and at an earlier stage. And Webster is not the only man in American history who would stand by what he believed to be right even if it meant violation of the law." The example of the socialist Eugene V. Debs in the last war is well known. Less well known is the example of Henry David Thoreau, author of *Walden Pond*, who—as a protest, not against conscription it is true, but against another form of slavery, negro slavery—refused even to pay his taxes. Thoreau refused to pay his taxes because the Union permitted slavery and Massachusetts, the state in which he resided, remained in the Union. He was put in the Concord (Massachusetts) jail and remained there until some well-meaning anonymous friend, without Thoreau's advice or consent, paid the tax for him, a gesture of which Thoreau bitterly complained. While Thoreau was still in jail his friend, Ralph Waldo Emerson, came to see him, and asked, "Henry, why are you here?" To this the prisoner replied, "Ralph, why are you Not here?" Thoreau elsewhere explained his attitude in the following words:

I know this well, that if one thousand, if one hundred, if ten men whom I could name—if ten honest men only—aye, if one honest man, ceasing to hold slaves, were actually to withdraw from this copartnership (with the state by not paying taxes) and be locked in the county jail therefor, it would be the abolition of slavery in America. For it matters not how small the beginning may seem to be, what is once well done is done forever Under a govern-

ment which imprisons any unjustly, the true place for a just man is also a prison (Quoted in the Kansas City Times, March 2, 1931).

In contrast to Thoreau your petitioner, perhaps wrongly, did not go out, so to speak, to pick a fight with the powers-that-be by refusing to pay his taxes. Petitioner docilely paid them (although, when officially informed by the administration of the University at which he was teaching that he was "expected to" invest a certain percentage of his salary in war bonds, he quietly but firmly refused so to invest his money, and, instead, gave it outright to the student loan fund). Petitioner even registered for the draft (although he wrote on the registration card that he would never serve in the army) and allowed himself to be bullied (by the threat of the draft law) into going up to the very brink of the cliff of induction, before he balked. And even then, there would have been no legal contest between petitioner and the powers-that-be, if he had been allowed to turn himself over to the civil authorities, to plead guilty of refusing to report for or submit to induction, and to take whatever punishment the civil courts might see fit to impose. But when the military authorities brazenly put petitioner under arrest and undertook to yank him over the induction boundary into military jurisdiction, they asked for trouble, and your petitioner has been happy to accommodate them. Thus, by their own high-handed action the military authorities actually provoked and enabled your petitioner to register a far more resounding protest against war and conscription than would otherwise have been possible, and for this your petitioner is grateful to them, no matter what may happen to him personally as a result of this protest.

(2) Unlike many religious objectors to war, your petitioner is not an absolutist on the question of killing. Draft boards frequently ask objectors a test question some-

thing like this: "If you were convinced that the only way you could save the lives of a thousand men would be to kill a homicidal maniac who was about to kill them, would you kill the maniac?" It seems that many religious objectors say that they would not kill the maniac, that "the Lord giveth and the Lord taketh away," and that it is not for a human being to decide who is to live and who is to die. But your petitioner replied to a similar question (at the hearing before his draft board) that under such circumstances he would without hesitation kill the homicidal maniac. In petitioner's opinion it would be quite irrational for a humane person not to kill under such circumstances for in this hypothetical case he is confronted with the limited alternative of being responsible for the death of one person or the deaths of a thousand, and certainly the former is the lesser of the two evils. It might here be remarked however, that when draft boards ask such questions it is implied that wars save lives; whereas in fact, the reverse is the case. It would be difficult, if not impossible, to find a war in history which has saved lives on either of the contesting sides. When violence is met with violence then murder, rape, and other crimes of violence occur (R. 16) as for example in Russia, Finland, Poland and other countries which have by violence "defended themselves" in this war. In Denmark the loss of life has been trifling by comparison. By refusing to "defend" the country by violence the Danish government saved the lives of its soldiers and preserved the homes of its civil population, and regardless of the outcome of this war petitioner doubts whether, all considered, this will ever be regretted by the Danish people. (This does not mean that the Danish people are not resisting the German occupation. They are; but on the whole not by violent means, but by keeping their heads erect, endeavoring to persuade the Nazis that they are in the wrong, and refusing to cooperate with them.)

(3) Although your petitioner is not an "absolutist" on the question of killing, he can imagine nothing sufficient to justify the wholesale and indiscriminate murder and mayhem of war. Moreover he doubts whether the average soldier on either side could possibly be so cruel as to carry out his orders if he had personally to inflict the torture which the shells that he fires or the bombs that he drops inflict. The airman who flies high over London, Berlin, Moscow, Helsingfors, Tokyo, or Pearl Harbor moves a lever and watches his bombs go plummeting down to the target below. There is a burst of flame, and debris flies upward and outward. Over the roar of his motors he barely hears the thunder of the explosion. He does not have to hear the agonizing screams of his victims. He does not have to see kind and gentle women who might remind him of his mother, or his sister, or his sweetheart, die writhing in agony from the horrible wounds he has inflicted. He does not have to see the little children whom he has condemned to go through life blind or deaf, minus an arm or a leg, or with a hideously disfigured face. He does not have to watch others, pinned under the wreckage of their homes, slowly burned to death by the flames which his bombs have started. He returns to his base and reports to his superior officer that the raid was "very successful" and the statisticians of his army prepare figures which some of his hate intoxicated fellow citizens will actually gloat over—five thousand killed, ten thousand injured, twenty thousand homeless, "very successful."

Your petitioner does not profess to be a Christian but he finds it difficult to understand how those who do profess to be Christians in the warring countries can reconcile their religion with participation in a war so brutal as this. In petitioner's view Christianity is as inconsistent with war as Mark Twain implied in his "War Prayer":

"O Lord our God, help us to tear their soldiers to bloody shreds with our shells; help us to cover their

smiling fields with the pale forms of their patriot dead; help us to drown the thunder of the guns with the groans of their wounded, writhing in pain; help us to lay waste their humble homes with a hurricane of fire; help us to wring the hearts of their unoffending widows with unavailing grief; help us to turn them out roofless with their little children to wander unfriended through wastes of their desolated land in rags and hunger and thirst, sport of the sun flames of summer and the icy winds of winter, broken in spirit, worn with travail, imploring Thee for the refuge of the grave and denied it—for our sakes, who adore Thee, Lord, blast their hopes, blight their lives, protract their bitter pilgrimage, make heavy their steps, water their way with their tears, stain the white snow with the blood of their wounded feet! We ask of One who is the spirit of love and who is the ever faithful refuge and friend of all that are sore beset, and seek His aid with humble and contrite hearts. Grant our prayer, O Lord, and Thine shall be the praise and honor and glory, now and ever. Amen" (Life of Mark Twain, Albert Bigelow Paine, Vol. III, p. 1232).

The inconsistency of Christianity with war is, in your petitioner's view, equally well illustrated by the Thanksgiving prayer of an American Army pilot in Italy, a prayer as near to the spirit of Christianity as it is far from the spirit of war. According to the newspaper report (Kansas City Star, December 2, 1943) the 22-year-old veteran said:

"Dear God, bless all the fighting men on all the fronts around the world—on both sides—because they are all fighting for what they believe is right. . ."

Your petitioner ventures to suggest that if the belligerent governments had the eye to see and the heart to understand this great truth, that their opponents are "*all fighting for what they believe is right*"—the war would end immediately, not in an illusory "victory" of one side over the other, but in a real victory for humanity.

And in your petitioner's opinion war is just as inconsistent with democracy as it is with Christianity.

What could be more inconsistent than to use an army of slaves to bring the "four freedoms" to the rest of the world?! If it appear that, since the soldier gets fifty dollars a month, this is an exaggeration, let the status of the conscript and that of the slave be compared in other respects. Your petitioner does not know what penalty could have been imposed upon a slave for striking his master or for refusing to obey his master's orders but according to the sixty-fourth article of war:

"Any person subject to military law who, on any pretense whatsoever, strikes his superior officer or draws or lifts up any weapon or offers any violence against him, being in the execution of his office, or willfully disobeys any lawful command of his superior officer, shall suffer death or such other punishment as a courtmartial may direct."

(In other words, if the shell-shocked private whom General Patton struck had struck back or had disobeyed his orders there would be nothing in the Articles of War to prevent a courtmartial from sentencing the private to death for the offense.) Your petitioner does not know what was the maximum penalty which could have been imposed upon a runaway slave, but according to the fifty-eighth Article of War a runaway soldier in time of war shall suffer "death or such other penalty as a courtmartial may direct." The soldier is asked to risk his own life in attempts to kill or maim others, the slave was not asked to do this. The soldier is torn away from his family, but the slave was not as a rule taken away from his wife and children. It is true, of course, that those soldiers who survive the war will be restored to their freedom and that they will probably get pensions of some kind or other (but those who are badly wounded or disfigured may live out their lives less happily than a healthy slave, and others may find themselves "free" to be unemployed and to be driven out of Washington by tear gas as were their predecessors of the first World War).

Nor is the use of an army of slaves to bring the four freedoms to the rest of the world the only political inconsistency in this war. Our most powerful ally, the one which has so long been seeking to "liberate" Finland of its democracy, is a dictatorship which, so far as your petitioner was able to observe in three years in Moscow, would make about as good a guardian for civil liberties as a wolf would for sheep.* Our other great ally joins in proclaiming the four freedoms, but when Ghandi, taking the proclamation seriously, asks for freedom now for India, he is thrown in prison for his insolence. And in our own country we find as the ardent champions of racial minorities elsewhere the same Senators who a few years ago filibustered to prevent the passage of an anti-lynching bill which might have helped to protect the rights of American negroes, Senators a few of whom come from states in which it is actually the racial majority that is deprived of the right to vote. And likewise we find that some of those who rightly denounce Hitler for herding unoffending Jewish people into concentration camps have with equal vigor championed the policy whereby our own government deprived unoffending Japanese Americans of their homes and fields and herded them like criminals into concentration camps, solely because it was from Japan that their trusting ancestors had come to this "land of the free."

During the war of 1812 Daniel Webster said, "Those who cry out that the Union is in danger are themselves the authors of that danger," and it would appear to your petitioner that, similarly, some of those who, pointing

*Petitioner is well aware of the much publicized "democratic" constitution of the Soviet Union. In fact your petitioner translated that constitution for the State Department and was at the time hopeful enough to think that it might possibly mean a little of what it said about freedom of speech, freedom of religion, etc. But he was sadly disillusioned by subsequent events such as the "democratic elections" in which there was nowhere more than one "candidate" for any office.

abroad today shout the loudest that our democracy is in danger are, at home, themselves the authors of the gravest threat to our democracy.

(4) Although, like many other members of the Unitarian church, your petitioner is an agnostic—he believes that he is perhaps more firmly convinced of the fundamental soundness and practicality of Christ's teachings than are some professed Christians.

In your petitioner's view the ethical system of the Old Testament which sanctifies our instinctive reactions to an outrage such as Pearl Harbor, is a system oriented toward the past, a system for **RESPONDING TO THE ACTIONS OF OTHERS**, "eye for eye, tooth for tooth" (Exodus 21:33). "Do (in the present) unto others as they have (in the past) done unto you," is its rule.

But the ethical system of the New Testament, on the other hand is a system oriented toward the future a system for **CONTROLLING THE ACTIONS OF OTHERS**. "Do unto others (in the present) as you would have them do unto you" (in the future) is its Golden Rule. The practicality of this rule, in your petitioner's opinion, lies precisely in the fact that it recognizes that "with what measure ye mete, it shall be measured to you again" (Matthew 7:2), that it recognized *the natural tendency of others to respond, and to think it right and honorable to respond, according to the Old Testament rule of "an eye for an eye, a tooth for a tooth,"* which implies also a favor for a favor, a kindness for a kindness. The principle of the Golden Rule appears in the scriptures of the other great religions of the world. For instance in the Buddhist Dhammapadam appears the precept: "Let a man overcome anger by love, let him overcome evil by good; let him overcome the selfish by generosity, the liar by truth."

So far as your petitioner has been able to observe, the Golden Rule is the best rule to follow in relations with the individuals of every country, and he sees no rea-

son to assume that it would not be the best rule to follow in relations between states. Wherever he has gone he has observed that a smile is almost invariably answered with a smile, a frown with a frown, an insult with an insult, and a favor with a favor. Sometimes he has enjoyed favors in return for kindnesses done by his fellow countrymen long before. Once in the town of Kavkazkaya in the south of Russia, when your petitioner was detained by the G. P. U. (because he had questioned and photographed the ragged, sick and hungry widow and children of a "liquidated" individual farmer), his release was effected by an officer who privately informed your petitioner afterward that his own family had been saved from starvation in 1921-22 by the American relief organization. In a village nearby where your petitioner spent a couple of weeks visiting a collective farm, several middle-aged people stopped him on the street to shake hands with him and thank him as an American for assistance which they had received during the same famine of 1921-22. These people had remembered this in spite of the malicious propaganda about America which your petitioner found almost daily in one organ or another of the official Soviet press. As a result of Hitler's invasion of Russia the Bolshevik government is at present our "democratic" ally, but it is not only in allied countries that your petitioner has had experiences such as those just mentioned. In the summer of 1938 your petitioner went to a Japanese physician in Tokyo to take a cholera serum. The physician refused to accept any payment either for the serum or for his services, stating that his family had received assistance through American relief agencies after the earthquake of 1923.

One of the practical applications of the Golden Rule is to appeal to the better nature of people even if it is not at first apparent that they have any better nature. In the fifteenth century Lorenzo the Magnificent, at the risk

of his own life, saved his country from the ravages of war by delivering himself into the hands of his worst enemy, Ferrante of Naples, the most cruel and cynical despot in Italy. The magnificent gesture of Lorenzo so moved the heart of the cruel Ferrante that he made a reasonable peace. Even people so misguided as to uphold the doctrines of the Ku Klux Klan or of facism may be capable of better things. For example we find in the November 2 issue of *Look* the story of a French officer, sought by the police in Madrid, who in desperation threw himself on the mercy of a notorious pro-Fascist also reputed to be a Christian. It was Christmas eve, the officer related:

"I walked to his home and threw myself on his mercy in the name of Christ. The Spaniard gave me a long look, but invited me in, fed me and gave me a bed. It was a cheap act of mercy if he were to turn me over to the police later, but I was too exhausted to care. I lay down and did not awaken until the bells were ringing for midnight mass . . .

"Just outside my door, as I awoke, a Spanish policeman was talking to my host: 'But señor,' said the rasping voice which sent shivers down my spine, 'we were told the stranger entered your house this evening. He is a Frenchman—and he is wanted by the German authorities.'

"I held my breath while waiting for the answer. It came after a long pause during which the Christmas bells pealed out in redoubled force, filling the air with their music. My host, the wealthy Spaniard then spoke: 'I am sorry, señor policeman,' he said, speaking slowly and softly, 'but you are mistaken.' His tone was final. I heard him walk out of the house with the policeman. Both of them were going to attend Christmas mass . . .

Such incidents are not confined to Christmas Eves in Spain, they may occur anywhere. Even soldiers on the battlefield are capable of similar generosity and honor to the men whom their respective governments have or-

dered them to kill. On August 15, 1943, the Kansas City Star published the following despatch from Harold V. Boyle, Associated Press correspondent in the Italian theatre of war:

Sergt. Earl Wills of Cohoes, N. Y., a member of the medical corps, opened the door of a gray Italian villa two miles behind the German lines and there inside were seventeen American parachutists and two German soldiers drinking wine and eating chow together, served them by an Italian civilian.

All the parachutists and the Nazis were armed, but they were laughing and having a good time. Nobody was shooting at anybody. Sergeant Wills stared in utter disbelief. He had never seen anything like that before in four years in the army.

"It happened a few days after we landed," he recalled.

"A paratroop officer, Lieut. Fred Thomas, came to our aid station and asked if we could come with him to treat two wounded Americans and a wounded German."

Wills and the lieutenant piled into two jeeps with three other medics - John Packard of Highland Falls, N. Y.; William Larson of Story City, Ia. and Robert Holden of Rochester, N. Y. With their Red Cross flags flying, they drove through the lines without trouble and turned in at the villa.

"I didn't say anything then, but I couldn't understand why there was no hostile air," said Wills.

"There were plenty of tommy guns and pistols around, but nobody seemed interested in using them. The Germans and parachutists were close to each other and passing the wine. They even took turns riding horses around the courtyard.

"But medics see a lot of strange things, so we didn't say anything. We patched up the wounded. All were litter cases. One of the American soldiers had a shattered arm. Another had been shot in the body. One German had shrapnel wounds in his arms, legs and hips." When the medic started to lead the wounded men into the jeeps to be taken to an Ameri-

can hospital the two Germans came over and wept as they bade goodby to their comrades. "I told them I'd be glad to take them along too if they cared to come" said Wills dryly, "but they told me they couldn't."

"As we started to leave, Thomas told us, 'You know you're in hot water?' I asked him what he meant and he said there were two German Tiger tanks outside in an orchard with their guns trained on the villa. 'I have to get their okay before you can leave,' he said. He came back a few minutes later and said it was all right for us to go and that if any enemy stopped us we were to give them the password 'Germa-Lisso' and that they would let us through. I couldn't stand all this mystery any longer and asked 'Lieutenant, what does all this mean?' "

Then the lieutenant told the sergeant one of the strangest stories of the war. He said that after being dropped far off their objective on the eve of the invasion, he and seventeen other parachutists had fought and marched their way through fifty miles of enemy territory only to be caught and captured two miles short of their own lines by the Nazi crews of the two tanks hidden in the orchard.

The tanks, part of a rearguard force had been disabled in battle but their cannons and machine guns still functioned. Against the threat of this firepower the parachutists had to yield or be slaughtered. Then the Germans proposed a weird bargain, a "gentleman's agreement." They had with them two wounded American soldiers and their own wounded friend who apparently was highly popular with the German tank men. Their own medical unit had retreated with the main body of German troops. They offered to let the parachutists go if the latter would take the wounded German to an American first-aid station. A condition was that the parachutists make no immediate attempt to counter-capture the two Nazi crews who wanted to blow up their disabled tanks before retreating and who would be at a disadvantage with their weapons thus destroyed. It was emphasized that the truce was only temporary and that the next time they met they would try to kill each other. Since the offer was obviously to their advantage, the

parachutists readily agreed and the rest were held as hostages while the lieutenant went to fetch the American medics. The agreement went through without a hitch. The Americans took off in one direction and the Nazis, after destroying their tanks, fled another way.

"We took it slowly going down the road for the first mile during which we passed about eighteen German bodies," said Wills. "Then we really let those jeeps roll and nobody tried to stop us. Next day we went back and sure enough there were the two blown-up tanks." The sergeant and other medics told Capt. John Lauten of Glendale, California, who at first didn't believe the story.

"But I set out to investigate it," he said, "and it turned out to be absolutely true. I found the two tanks with their turrets and guns blown up and I talked with the parachutist lieutenant, who corroborated the story. I know the story sounds crazy, but crazy things happen in war."

Your petitioner would say that far from sounding crazy the story sounds sane, and that it just goes to show that sane things happen even in an insane war.

In his dealings with the Indians, William Penn followed the Golden Rule. The animosity of the Indians had been aroused by the conduct of previous white settlers in Pennsylvania and as a result a few of the first Quaker settlements were raided. But Penn sent out no punitive expeditions to avenge the murder of the settlers. Instead the Quakers seized upon every opportunity to aid the Indians, provided them with food and clothing when they were in need, and cared for them when they were sick. The raids ceased and the Indians came to look upon the Quakers as friends, even trusting them as Indian representatives in dealings with white men who were not Quakers. It may be that the Quakers originally followed this policy not so much because they were convinced that it would be practical here on this earth as because their

religion required them to follow such a policy, regardless of the earthly results. However the Bible records at least one instance in which a policy similar to that of William Penn was adopted precisely because it appeared to be the only practical means whereby a massacre might be averted. Jacob, who had grievously wronged his brother Esau, learned that the latter was advancing on him with four hundred men. First he prayed, "Deliver me I pray thee, from the hand of my brother, from the hand of Esau; for I fear him lest he come and smite me, and the mother with the children" (Genesis 32:11). Then he "took of that which came to his hand a present for Esau his brother" (Genesis 32:13), several hundred head of livestock and divided them into droves with servants at the head of each drove.

17. And he commanded the foremost, saying, When Esau my brother meeteth thee and asketh thee, saying, whose art thou? and whither goest thou? and whose are these before thee?

18. Then thou shalt say, They be thy servant Jacob's; it is a present sent unto my lord Esau; and, behold, also he is behind us.

19. And so commanded he the second and the third, and all that followed the droves, saying, On this manner shall ye speak unto Esau, when ye find him.

20. And say ye moreover, Behold thy servant Jacob is behind us. For he said, I will appease him with the present that goeth before me and afterward I will see his face, peradventure he will accept of me (Genesis 32).

1. And Jacob lifted up his eyes, and looked, and behold Esau came, and with him four hundred men. And he divided the children unto Leah and unto Rachel, and unto the two handmaids.

2. And he put the handmaids and their children foremost, and Leah and her children after, and Rachel and Joseph hindermost.

3. And he passed over before them, and bowed to the ground seven times until he came near to his brother.

4. And Esau ran to meet him and embraced him: and they wept

8. And he said, what meanest thou by all this drove which I met?

And he said, These are to find grace in the sight of my lord.

9. And Esau said, I have enough my brother; keep that thou hast unto thyself (Genesis 33).

Now it might be said that this is "appeasement," and that it has been tried and found wanting against our present enemies. To such a reply the comment of a Chinese philosopher who lived more than two thousand years ago would in your petitioner's opinion, be appropriate.

Mencius said:

Benevolence subdues its opposite just as water subdues fire. Those, however who nowadays practice benevolence do it as if with one cup of water they could save a whole wagon load of fuel which was on fire, and when the flames were not extinguished, were to say that water cannot subdue fire. This conduct, moreover, greatly encourages those who are not benevolent (Mencius, Book 6).

By this quotation it is the intent of your petitioner to suggest that appeasement has never really been tried. In his opinion, if a fraction of the effort now being used to harm the people of the countries with which we are at war, if a fraction of this effort had been used to benefit the peoples of these countries, there would have been no war, no Hitlers and no occasion for a large standing army. Our country would be respected for its goodness rather than for its might. But in your petitioner's view, it will take an army to maintain the "victory" which we now appear to be winning with an army, unless the allied gov-

ernments adopt saner plans than are now in evidence. As Mencius said:

When one by force subdues men, they do not submit to him in heart. They submit because their strength is not adequate to resist. When one subdues men by virtue, in their heart's core they are pleased and sincerely submit . . . (Mencius, Book 2).

Our government cannot consistently maintain that the Golden Rule will not work against our enemies, because it is following that rule in the treatment of prisoners of war. "Do unto the prisoners of war from Axis countries as you would have them do unto the Americans who are their prisoners" is the rule which our government follows. Moreover if we may judge by official Red Cross and State Department reports this policy has, by and large, proven very practical in securing more considerate treatment for American prisoners of the Axis powers. What your petitioner cannot understand is why this policy should not be extended to the whole field of our relations with all the countries of the world. Food would be a logical item with which to start. Our granaries are filled to overflowing and people are starving in other countries. There is no reason why our surplus food should not be sent to them. If we can also get some of it to the Germans and the Japanese and let them know who sent it so much the better. Whatever their governments might feel, many individuals would feel themselves under obligation to us for this kindness and would find it difficult to reconcile this feeling of obligation with military hostilities against us. Nothing could be better calculated to do away with their animosities. And if the enemy governments noticed that our action was thus undermining fighting morale they would scarcely dare to stop it, for that would put themselves in the position of denying things to their own people, a position quite incompatible with their claims to be working for the best interests of their people.

At the same time—admitting that the short-sighted economic warfare in which American capitalism has been one of the chief aggressors (high tariffs, dollar diplomacy and the like) has played an important part in bringing about the present armed conflict—we should persuade ourselves, and point out to our fellow human beings in other countries, that it would be to their interest, as well as to our own, to renounce this unnecessary fratricidal struggle among ourselves and unite against the ever-present common enemies of all mankind—want, disease, and ignorance. Instead of demanding that our opponent submit to us in humiliating “unconditional surrender” we should point out how it would be to our mutual benefit for both sides to submit to certain common principles (We might propose, for example: the association of power over people with responsibility for their welfare; the abolition of all tariff duties, the adoption of a common monetary system, and the creation of a gigantic public corporation to handle international commerce at cost, without discrimination between nations.) Nor should this be just a trick by which to deceive the opposing governments into surrendering to our armed forces. This policy should be continued when peace had been restored. With the enlightened selfishness of cooperation in all good causes we should put greedy, short-sighted imperialists to shame and consistently practice ourselves what we have been preaching for others.

In your petitioner's opinion if we took a determined initiative in applying the policies indicated by the Golden Rule and devoted as much energy and ingenuity to the pursuit of these policies as we are now devoting to the war effort, we could convert this contest among the nations from a contest in doing harm to one another to a contest in doing good for one another. Possibly even a man like Hitler could by such methods be converted from a Saul into a Paul. He might not want to be outdone by Churchill, even in a contest of generosity!

When a spirit of mutual trust, good will, and understanding had been built up by methods of this kind, it should not be difficult to merge our national sovereignties into one great country, the United States of the World. In such a country, causes of future strife could be greatly reduced by the conversion of the largest private corporations into public corporations similar to the T. V. A., corporations owned by humanity and operated, not for private profit, but for the benefit of humanity.

(5) Unlike some conscientious objectors your petitioner refuses to accept any kind of non-combatant service in the army. It has been suggested to him that he might make things much easier for himself now and in the future and at the same time do "humanitarian" work by going into the army medical corps. Your petitioner's view on this point was well expressed by a wounded soldier whom Mrs. Roosevelt interviewed in the Pacific war zone. According to the president's wife (for whose consistent efforts to understand, and fairly to present, the points of view of others your petitioner has considerable respect), the wounded soldier said of the treatment he and his wounded comrades were receiving:

"The government does this for us so's we'll be able to go out and die. But they never did it for us so we could live" (Kansas City Times, November 13, 1943).

Viewed by itself the work of the army medical corps appears to be humanitarian, but if it cures a man of his sickness or injuries, the man is again seized by the combatant branch of the army and sent out to kill others and perhaps himself to suffer graver wounds than he had before, or death. That is why your petitioner refuses to accept service even in the "humanitarian" medical corps of the army.

These paragraphs may clarify somewhat the position of your petitioner with regard to war and conscription. No matter what the penalty for refusing to serve in the Army, your petitioner will never serve in it. However, as he indicated at the hearing (R. 37) he is strongly desirous of serving humanity in general, and his country in particular, in a manner consistent with his convictions, and he hopes that, in prison if not outside, the Government will find it possible to put to some use his rather good education and his knowledge of foreign languages.

It is of course for the court to decide whether or not to consider petitioner's objection to war and conscription as an additional legal ground for granting this petition. For his own part, your petitioner remains convinced that the legal grounds presented at the initiation of the habeas corpus proceeding, are more than sufficient to warrant his release from the hands of the military authorities to the hands of the civil authorities.

COMMENT WITH REGARD TO THE FINDINGS OF LAW IN THE MEMORANDUM OPINION OF THE DISTRICT COURT.

It is stated in the Memorandum Opinion of the District Judge (R. 43) that "Rules and regulations now in effect and in effect at the time the petitioner presented himself at the Leavenworth induction center carry no provision for the giving of an oath." In support of this contention Judge Hopkins points out that paragraph 429 of the original Selective Service Regulations contains two sentences which do not appear in the corresponding paragraph (633.0) of the revised regulations. However he evidently overlooks the fact that MR 1-7, paragraph 13e overlapped paragraph 429 of the original Selective Service Regulations, and that while the amendment of the latter did away with the overlapping, it did not do away with the

provision for the administration of an oath which remained in MR 1-7, paragraph 13e. Hence the statement that the rules and regulations in effect at the time that the petitioner presented himself at the Leavenworth induction center "carry no provision for the administration of an oath" does not correspond with the facts. In view of the fact that the provision for the administration of the oath remained in MR 1-7, paragraph 13e it is not necessary to answer the assertion that the amendment of the Selective Service Regulation to eliminate provision for the administration of an oath was "undoubtedly" made "to avoid question being raised and to avoid waste of army time and effort in resisting such unprovident proceedings as the one here" (R. 45). The regulation might have been amended simply because the part omitted overlapped the provisions of another regulation (MR 1-7, par. 13e).

The conclusion of the Judge of the District Court that "The giving of an oath and admonition that you are now in the army, constitute mere formality" (R. 45) is apparently also based on the erroneous assumption that there was no longer any regulation requiring the administration of an oath.

It is further stated in the Memorandum Opinion that "The whole statutory procedure outlined in the Act and the regulations thereunder, culminating in petitioner's examination and notice of acceptance operated as induction" (R. 45). In coming to this conclusion the Judge of the District Court apparently overlooked not only the previously noted provisions of MR 1-7, paragraph 13e, but also a provision appearing in section 3 (a) of the Selective Service Act itself. This provision is:

That no man shall be inducted for training and service under this Act unless and until he is acceptable to the land or naval forces for such training and service and his physical and mental fitness for such training and service has been satisfactorily determined.

From this it is quite clear that the physical examination comes before and is not a part of induction.

If any further evidence on this point were needed, it could be found in the language of paragraph 633.9 of the Selective Service Regulations which the court itself cites as one of the pertinent regulations. This paragraph reads as follows:

At the induction center, the selected men *found acceptable will be* inducted into the land or naval forces. From this also it is evident that a person cannot be inducted until after he has been examined and found to be acceptable.

Because of the statutory provisions noted above, the evidence to the effect that before his physical examination petitioner slept in Army barracks and ate in an Army mess hall is completely irrelevant to the case. So did all those not found acceptable.

It is even contended by the District Court (R. 45) that petitioner has "in fact fully complied with the terms of the Selective Training and Service Act," that "there may be some question as to whether he has committed an act for which he might be prosecuted in the civil courts" and that "an order from this court releasing him from the military authority might have the anomalous result that petitioner would walk away scot free of both the military and the civil authorities." In view of the fact that the petitioner freely admits that he has violated the most important provision of the Selective Service Act it is difficult to see upon what such a contention is based. One law requires that petitioner serve in the Army, another requires that he pay a tax; refusal to serve in the Army is surely as obvious a violation of the former as refusal to pay a tax is of the latter. The situation may be illustrated by an analogy. Suppose the law required petitioner to walk to the cliff of induction and to jump over it into service in the Army. If petitioner refused to take the first step, registration, he could clearly be pros-

ecuted in the civil (R. 24) courts for refusing to do so. If he refused to take the second step toward the cliff of induction, filling out the questionnaire, he could be prosecuted in the civil courts for refusing to do so. But, according to the Judge of the District Court, if he refused to take the crucial step over the cliff of induction there may be some question as to whether he has committed an act for which he might be prosecuted in the civil courts. So, to continue the analogy, the honorable Judge proposes to let the military authorities reach up and drag the petitioner over the cliff of induction into the valley of involuntary military servitude and there to court martial the petitioner, not for refusing to jump over the cliff of induction, but for refusing to obey a military order to take the first step of fingerprinting in the valley of involuntary military servitude.

The remaining contentions of the District Court are sufficiently answered elsewhere in this brief.

An answer to the written opinion of the Circuit Court of Appeals accompanied the petition for a writ of certiorari.

**REPLY TO THE ARGUMENT OF THE BRIEF FOR THE
RESPONDENT IN OPPOSITION (ON PETITION
FOR WRIT OF CERTIORARI).**

The respondent's side of the argument opens with the following statement:

In substance petitioner's argument that he was not legally inducted into the Army is based upon the proposition that the obligation imposed by the Selective Training and Service Act is not specifically enforceable and that punishment for civil disobedience is the extreme sanction whereby, under the Constitution, the United States may exercise its power to raise armies and resist aggression. As a constitutional proposition it is self-refuting (p. 6).

To this it should be a sufficient answer that, in their treatment of the men who balk a step or two farther from the cliff of induction than did your petitioner, the responsible authorities themselves appear tacitly to accept the allegedly "self-refuting" proposition attributed to your petitioner. For those who refuse to register for the draft, for those who refuse to fill out the questionnaires, and for those who refuse to report for the medical examinations—the legal obligation (to serve in the Army) imposed by the Selective Training and Service Act is *not* specifically enforced, and punishment for civil disobedience is the extreme sanction by which the United States exercises its power to raise armies.

If any proposition upon which the substance (or any part) of your petitioner's argument may be based is, as the respondent contends "self-refuting"—it certainly is not self-evident that this is the case, and in the absence of proof the respondent's contention to this effect cannot be sustained. But no proof is presented by the respondent either in the text of his brief or in his citation from the Selective Draft Law Cases. In this citation all that is said

to be "refuted by its mere statement" is what would appear to be the court's own mockery of a contention that the whole World War draft law was unconstitutional because it imposed involuntary servitude.*

At this point it might again be noted that the question of whether a man drafted into the Bolshevik, American, or Nazi armies, is in voluntary service or involuntary servitude is not a question of law which may be decided by the courts once and for all, but a question of fact which (as the derivations of the terms voluntary and involuntary themselves imply) cannot logically be resolved without reference to the will (*volonté*) of the individual involved. For one German patriot what the Nazi draft law requires might appear to be voluntary service, "the performance of his supreme and noble duty" (to use the language of a decision cited by the respondent)—but for an equally patriotic German who is convinced that war is a wrong and self-defeating means of attempting to defend the "rights and honor" of his nation, what the same German draft law requires would certainly be involuntary servitude to which he would feel it his patriotic duty to refuse to submit. An analogous proposition would hold for other countries including our own.

*The remark of the court on which the respondent apparently relies reads as follows:

Finally, as we are unable to conceive upon what theory the exaction by government from the citizen of his supreme and noble duty of contributing to the defense of the rights and honor of the nation, as the result of a war declared by the great representative body of the people, can be said to be the imposition of involuntary servitude in violation of the prohibitions of the Thirteenth Amendment, we are constrained to the conclusion that the contention to that effect is refuted by its mere statement (*Selective Draft Law Cases*, 245 U. S. 366, at p. 390).

In answer it might first be pointed out that this remark was made in connection with the draft for the first World War "to make the world safe for democracy" and that, in the light of the disillusioning developments of the past twenty-five years

The answer to the question of whether what the draft law would require of a man should be held to be voluntary service or involuntary servitude lies not in what the law would require of the individual, but in the reaction of the individual to what the law would require of him. In the present case an unequivocal answer to this question is to be found in the reaction of your petitioner to the efforts to induct him into the Army and, subsequently, to the efforts to get him to act as if he were a soldier.

Surely, in view of the language of the Thirteenth Amendment, no court could deny that a prisoner at hard labor may be presumed to be in involuntary servitude. When confronted with the limited alternative of becoming such a prisoner or of becoming a soldier, your petitioner chose involuntary servitude in prison. That fact in itself should be proof sufficient that to put petitioner into the army, even as an officer in a non-combatant unit, would be to put him into involuntary servitude to him still more reprehensible than that to which he would be subject in prison.

So much in answer to the first two sentences in the opening paragraph of the respondent's argument. The remainder of that paragraph may be more briefly answered. It reads as follows:

there is serious question as to whether the sacrifices of the men drafted for that war did actually contribute to "the defense of the rights and honor" of this or any other nation. Some well-informed people would even go so far as to contend that as a direct result of the first World War the world was made less safe for democracy.

Your petitioner earnestly believes that he is at least as desirous of "contributing to the defense of the rights and honor of the nation" as is the average volunteer soldier, but in distinction from the latter your petitioner is convinced that war is a wrong and self-defeating means of making such a contribution, and that the most efficient, and the only right, means of making a lasting contribution to the defense of the rights and honor of the nation are means consistent with the Golden Rule.

The express power to levy war may not be thus legally nullified by a citizen's or a citizenry's choice of prison in preference to war. It contemplates more effective service than the suffering of civil punishment (p. 6).

Now if the express power to wage war would to any extent be legally nullified by a citizen's choice of civil prison in preference to war, it would to an equal extent be legally nullified by the citizen's choice of military prison (or death)* in preference to war—so the respondent's contention on this point is irrelevant to the question of whether your petitioner should be subject to civil or to military punishment.

The citizenry of this country, by their absolute refusal to wage war, could surely nullify, legally and in fact, the most specific power of the Government to wage war, and it is surprising that the contrary should be contended, for such a contention would imply not only that the Government had the right to wage war in flagrant defiance of the will of the people, but that it had the might to do the im-

Finally, the mere fact that the members of "the great representative body of the people" have declared a war and, specifically exempting themselves, have drafted others to fight it, is no proof that the draft does not involve involuntary servitude for anyone. On many an occasion in its history Congress has unfortunately shown itself quite capable of giving its blessing, at least locally, to the institution of slavery (e. g. when it approved constitutions permitting slavery for Louisiana, Mississippi, Alabama, etc.).

If this is not a sufficient answer to the opinion cited, then perhaps the remarks of Daniel Webster quoted in the appendix will be.

*Although according to Article of War 64, the penalty for refusing to obey a direct order is "death or such other punishment as a courtmartial may direct" the Army authorities at Ft. Leavenworth in practice have probably been less severe in their punishment of conscientious objectors than has been the Kansas District Court. Most of the Army officers with whom your petitioner has come in contact (and this definitely includes the respondent) have shown far more consideration for your petitioner as an individual, and a much better understanding of his opposition to war, than was shown by the Judge of the District Court.

possible—to wage a war through the instrumentality of a citizenry that absolutely refused to wage war. If the citizenry of the most tyrannically governed country on the face of the earth absolutely refused to wage war, the dictatorial government could not wage war. It could issue a decree to the effect that all citizens had “by operation of law” (R. 45) become members of the armed forces and, when they continued to refuse to wage war, it might sentence them to military prison or to death, but still the citizenry would have nullified the dictatorial government’s power to wage war.

Further proof of the untenability of the respondent’s contention on this point is to be found in the fact that during the War of 1812 the New England States, by refusing to respond to the federal government’s call for militia, to a considerable extent did nullify the specific power of Congress:

To provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions (Article I, Section 8, par 15 of the Constitution of the United States).

As to what was contemplated by the Constitutionally conferred war powers, the respondent’s contention, even if sustainable, would be irrelevant to the issue of whether your petitioner should be subject to civil punishment or to military punishment for his refusal to submit to induction into, or service in, the army. The imposition of military punishment does not constitute the exaction of “more effective service than the suffering of civil punishment.” The officers in charge of the guardhouse in which your petitioner is confined, pointing out that soldiers who might be used for other purposes are required to guard those confined, have repeatedly told the prisoners there that as prisoners they are a hindrance rather than a help to the war effort. Teaching economics at the University of Texas, your petitioner was, in his opinion, rendering

much more effective service to his country than he is likely to be allowed to render in any prison, civil or military (or in any concentration camp for conscientious objectors).

So the respondent's contention as to what the constitutionally conferred war power contemplates would not be relevant even if it could be sustained. Nor can the respondent's contention be sustained. There is historical reason to doubt that the framers of the Constitution ever contemplated conferring upon the federal government any power of conscription at all, let alone a power so absolute as that for which the respondent contends. The only conscription bills introduced in Congress during the lifetime of any of the members of the Constitutional Convention were rejected by Congress, although the very existence of the country appeared to be threatened at the time when these bills came up for consideration (This was in the War of 1812 during which the British captured Washington and set fire to its public buildings, invaded Maine, etc.). In the debate which preceded the defeat of Monroe's conscription bill Daniel Webster on December 9, 1814, eloquently branded conscription as unconstitutional in principle. Answering the contention of the Secretary of War that conscription was implicitly authorized under the Constitutional power to raise armies, Mr. Webster said:

... The Constitution is libeled, foully libeled. The people of this country have not established for themselves such a fabric of despotism. They have not purchased at a vast expense of their own treasure and their own blood a Magna Charta to be slaves. Where is it written in the Constitution; in what article or section is it contained, that you may take children from their parents and parents from their children, and compel them to fight the battles of any war in which the folly or the wickedness of government may engage it? Under what concealment has this power remained hidden which now for the first time comes forth, with a tremendous and baleful aspect, to trample down and destroy the dearest rights of personal liberty...

An attempt to maintain this doctrine upon the provisions of the Constitution is an exercise of perverse ingenuity to extract slavery from the substance of a free government . . . (further excerpts from Webster's speech appear in the Appendix to this brief).

This should, in petitioner's opinion be a sufficient rebuttal to the contentions in the first paragraph of the respondent's argument. The second paragraph of his argument may now be considered. It opens with the following sentence (p. 6):

Petitioner's position is no stronger under the provisions of the Selective Training and Service Act and the regulations issued thereunder.

In fact, although it apparently need be no stronger in order to withstand the previously considered contentions of the respondent, your petitioner's position is specifically reinforced by the previously cited provisions of:

Section 11 of the Selective Training and Service Act, Mobilization Regulation 1-7, Paragraph 13e, Article of War 109, etc.

It is no answer to these specific provisions to state, as the legal representatives of the respondent do next (p. 7) that the draft Act "speaks in terms of compulsory military service." Military service is for your petitioner just as compulsory as, BUT NOT MORE SO than for the other selectees who are regularly tried in CIVIL courts for "refusal to report for induction." With regard to these other selectees the authorities do not attempt specifically to enforce service in the Army; neither do the authorities go out and capture these selectees, drag them to an induction center, and then claim that reporting for induction "occurs by operation of law" and that "it is something over which the party affected has no control" (R. 45).

It is also compulsory that drivers stop their vehicles upon coming to a red light, but that does not mean that every driver will inevitably stop his car at each red light.

The compulsion consists in the threat that, if he does not stop his car, he may be subject to say five days in jail or a ten dollar fine or both. This compulsion is sufficient to bring about specific compliance with the terms of the traffic law in most cases. The compulsion in the case of the Selective Training and Service Act consists in the threat (Section 11) that—if one “knowingly fails” to do anything prescribed by the Act or regulations or “otherwise evades registration or service in the land or naval forces, or any of the requirements of this Act” he may be subject to five years in prison or a ten thousand dollar fine or both (or if subject to military law, to such punishment as a courtmartial may direct—but with the specific proviso that no one shall be subject to trial by courtmartial unless such person shall have been “actually inducted” for the training and service prescribed). This compulsion is sufficient to bring about specific compliance with the terms of the Act in most cases. Most men who would not voluntarily have served in the Army are intimidated into taking all the steps that lead up to and over the cliff of induction: registration, filling out and returning of questionnaires, reporting for and submitting to physical examination by the Army medical authorities, and reporting for and submitting to induction into the Army. The last step is no more compulsory than the first or the next to the last, and there is no more reason for trying by courtmartial a man who refuses to take the crucial step over the cliff of induction than there is for trying by courtmartial a man who refuses to take any of the preceding steps.

The next contention of the respondent's argument deserves particular attention because, while at first glance it appears to be both correct and relevant to this case, the appearance turns out to be most deceiving. The contention reads as follows (p. 7):

In providing that no man, without his consent, shall be inducted for training and service under this Act

after he has attained the forty-fifth anniversary of the day of his birth, Section 3(a) clearly presupposes that actual induction may proceed without the selectee's own consent in other cases.

Since all those soldiers who would not have consented to go into the Army in the absence of compulsion, but who *have consented under compulsion to go into the Army*, have obviously been *inducted without their freely given consent*—it follows that *the above cited provision of Section 3 (a) would presuppose something relevant to the case of your petitioner*, who has refused even under compulsion to go into the Army, *only if the word "consent" as used in the provision included the kind of consent which might under compulsion be given (or refused) by a man over forty-five.* But "consent" as used in the *provision cited means freely given consent and excludes the kind of consent which might be given under compulsion.* This can be easily demonstrated. Do the Army authorities maintain that they can induct a man over forty-five years of age who would not consent to induction in the absence of compulsion, but who will consent to induction under compulsion (the threat that, if he doesn't consent, he may be sentenced to five years in prison and a ten thousand dollar fine)? Of course the Army authorities do not maintain this. It follows that in fact the provision cited in the respondent's argument clearly presupposes only that men under forty-five may be inducted without their *freely given consent*. Nobody denies that! Your petitioner is of the opinion that the great majority of the soldiers in the Army have been inducted without their freely given consent even though they have all given their consent under compulsion." So the contention in the respondent's argument as to what the provision cited "clearly presupposes" turns out to be neither relevant to the case at hand, nor correct in the sense in which it was meant.

The next sentence in the respondent's argument reads as follows (p. 8):

It is his proving acceptable to the land forces that constitutes the basis of, and last condition precedent to, induction.

Your petitioner is not quite sure what was meant by this sentence. If it was meant as a reaffirmation of the contention that Section 3(a) "clearly presupposes that actual induction may proceed without the selectee's own consent," provided that he is under forty-five years of age—it is just as irrelevant to the case at hand, and just as incorrect in the sense meant, as it was when stated the first time. If, and insofar as, what was meant by the sentence in question was only that being physically examined and found acceptable constituted a "condition precedent" to, and hence not a part of, induction—your petitioner would agree. [In his brief to the Circuit Court of Appeals your petitioner endeavored to demonstrate this very point to prove that the District Court, overlooking the provisions of Section 3(a) had erred in holding (R. 45) that "the whole statutory procedure outlined in the Act and the Regulations thereunder culminating in petitioner's examination and notice of acceptance operated as Induction."] However, proving acceptable to the land forces constitutes the "last" condition precedent to induction only in a sense similar to that in which obtaining a marriage license (which indicates that the proposed marriage is acceptable to the government) constitutes the "last" condition precedent to marriage. The marriage ceremony cannot begin until the marriage license has been obtained and the induction ceremony cannot begin until the selectee has been found acceptable. But even though the marriage license has been obtained, a couple cannot be inducted into holy matrimony if either of the parties does not report for the marriage, or, upon coming to the church for some other purpose, refuses to take the marriage vow and to assume the obligations of marriage. Similarly, in your petitioner's opinion, a man cannot be inducted into the Army if he does not report for induction, and, upon coming to the induction building for the purpose

of making an inquiry, refuses to be inducted, refuses to take the oath of induction. There is however a distinction in the effect of refusal in this case. If a man refuses to take the marriage vow, the courts may make him pay damages for breach of promise; but, if a selectee refuses to submit to induction, the courts may and should under the terms of the law make him pay a fine, or sentence him to prison, or both.

The remainder of the paragraph (of the respondent's argument) under discussion establishes the fact that it was not for the selectee's benefit that two of the provisions of Section 3(a) prohibit the induction of alien enemies and selectees in general, respectively, unless and until they have been found acceptable to the land or naval forces (pp. 7-8). Your petitioner has never contended the contrary. [All that your petitioner has contended with regard to either of these provisions is that, under the latter of the two, taking the physical examination and being found acceptable constituted a condition precedent to, and not a part of, induction. The respondent's present legal representatives apparently agree (pp. 7-8) that this is the case.]

But in the next paragraph the respondent's argument jumps from the above-mentioned incontestable fact, as a premise, to a conclusion which does not follow from it at all. This paragraph being as follows (p. 8):

Proving "acceptable to the land or naval forces" is no more for the citizen selectee's benefit than for the alien's, and an unequivocal indication by the military authorities, after examination of their acceptance, is in either case tantamount to induction.

The conclusion is a logical *non sequitur* from the premise stated, and, even taken by itself, is not correct if the selectee has flatly refused to "take" the oath of induction as prescribed in Article of War 109, the terms of which are explicitly invoked by Mobilization Regulation 1-7, paragraph 13e.

An unequivocal indication by the military authorities of their acceptance of a man into the Army at the conclusion of an induction ceremony, which is to be distinguished from the acceptance of a selectee for training and service at the conclusion of the physical examination (to which the respondent apparently refers) is comparable to the solemn statement "I now pronounce you man and wife" which concludes a wedding ceremony. This pronouncement would obviously be without legal effect if either of the parties had flatly refused to go through with the marriage. Similarly your petitioner earnestly contends that, as applied to himself, the assertion "That doesn't make any difference, you are in the Army now," coming as it did after petitioner's flat refusal to be inducted into the Army and to take the oath of induction (R. 22) was without legal effect.

It is further contended in the respondent's argument (p. 8) that

The Selective Service Regulations use the word "induction" as the antithesis of "rejection"—in other words as meaning simply "acceptance" by the land or naval forces.

Judging only from the provisions cited in the respondent's brief, this contention might possibly appear to be correct. However it is not, and this is easy to establish: Except where a selectee has obtained special permission to take the final physical examination (by the Army medical authorities) in advance of the date scheduled for his induction, the Selective Service System now sends him a combined order to report for the final physical examination and, if accepted, to report for induction. This official Selective Service order, bearing the short title "Order to Report for Induction" (DSS Form 150, revised January 15, 1943), contains the following sentence:

You will there be examined, and, if accepted for training and service you will *then* be inducted into the land or naval forces.

From this sentence it should be clear that "acceptance" for training and service does not mean "induction." If one may judge from the sentence above quoted, acceptance for training and service by the land or naval forces comes before, and is not a part of induction.

The respondent's contention as to the meaning of the word "induction" is also refuted by the official definition of that word given in the Federal Register (Volume 5, No. 187, page 3780, paragraph 102). The official definition reads as follows:

Induction is the process by which the men selected for military service pass from the status of civilians to the status of members of the land and naval forces of the United States.

It will be noted that, according to this official definition the men selected "pass" (active voice), not "are passed" (passive voice), from the status of civilians to the status of soldiers. The use of the active voice clearly indicates that it is the men themselves who take the step from civil to military jurisdiction, albeit under compulsion (the threat that if they do not take it they may be subject to five years in prison or a ten-thousand dollar fine or both). It is implied by the official definition that the step is not taken for them "by operation of law" (R. 45). The very etymological derivation of the word "induction" refutes the respondent's contention to the effect that induction is a process purely passive so far as the person inducted is concerned, a process to the completion of which his cooperation is quite unnecessary. The word induction means literally the process of leading (into). A person may be dragged into something without taking any steps, but he cannot be said to have been led, (inducted) unless he has taken steps himself. Induction differs from what the Army has tried to do to your petitioner in the same way that seduction differs from rape.

The District Court decision in the case of *United States ex rel. Diamond v. Smith* is the only decision presented by the respondent in direct support of his contention that your petitioner was lawfully "inducted" (In this decision, interestingly enough, the District Court opinion in your petitioner's own case was the only one presented in direct support of the finding that Diamond had been lawfully inducted). The ruling in this decision as to when induction takes place reads as follows (47 F. Supp. 609):

Thus if this regulation has the force of law—it seems that if a man successfully passes the physical examination and is accepted by the army for training and service, he is inducted into the army whether he takes the oath administered to him or not . . . When a draftee is accepted by the Army for service and training, all the requirements of the Act and regulations have been satisfied. The completion of the steps outlined in the Act and regulations operates as induction.

This obviously amounts to asserting that when a draftee is "accepted by the Army for training and service" his induction is completed. As has been previously noted, a contention to this effect is refuted by the explicit statement or command to the selectee, in an official Selective Service order (DSS Form 150), that "if accepted for training and service you will *then* be inducted into the land or naval forces" from which it follows that acceptance for training and service is a condition precedent to, but not a part of, induction. It might also be noted that in the above cited decision the use of the word "administered" to apply to a case where the oath was not taken, is incorrect. This may be demonstrated by example: Suppose that a surgeon were to ask a nurse whether or not she had administered an anaesthetic to a patient, and that in fact the nurse had poured chloroform on a mask and had put the mask over the patient's nose and mouth, but that the patient had knocked the mask off and had refused to take

the anaesthetic. Now we may ask ourselves whether or not the nurse could correctly answer the surgeon's question in the affirmative. Obviously she could not. What *she might correctly answer* would be "No, I tried to administer it to him, but he refused to take it." Or suppose that a judge should ask the bailiff whether or not he had administered the oath to a witness, and that in fact the bailiff had read the oath to the witness who had flatly refused to take it. Now let us ask ourselves whether or not it would be correct for the bailiff to answer the judge's question in the affirmative. Obviously it would not. The correct answer would be "No, I read it to him, but he refused to take it." Neither an anaesthetic nor an oath can be said to have been "administered" unless the anaesthetic or the oath has been taken.

The next contention in the argument of the brief for the respondent (p. 9) is that

A proposition that subscription to an oath or affirmation is a condition precedent to completion of a procedure that by hypothesis is compulsory throughout is self-contradictory.

Here again is a contention in which the respondent's legal representatives mistake the word "compulsory" for the word "inevitable." The logical fallacy of the respondent's contention that the proposition stated is "self-contradictory" may be exposed by reference to the example of a logically identical proposition: Suppose a traffic law having the following provisions:

It shall be compulsory for drivers of vehicles, upon approaching a red light, to slow down their vehicles, and just before reaching the red light, to bring their vehicles to a full halt.

The proposition is that slowing down a moving vehicle is a condition precedent to stopping it. (i. e., "to the completion of a procedure that by hypothesis is compulsory throughout"). Is this proposition "self-contradictory"?

Of course it is not! Neither is the proposition that taking the oath is a condition precedent to induction!

The respondent's argument continues with the statement that

Neither the Selective Training and Service Act nor the Selective Service Regulations require that a selectee subscribe to an oath.

This is true, but taken by itself it would be misleading since the oath requirement appears in other regulations having the force of law (Mobilization Regulation 1-7, Paragraph. 13e).

It is next stated in the respondent's argument that the oath requirement of Article of War 109 "has been held applicable of its own force only to men who voluntarily enlist." However, it might be pointed out that the contrary was implicitly ruled in the case of *United States v. Prieth et al.* (2 Cir., 251 Fed. 946, 954), where it was held that "enlistment" as used in the Articles of War applied both to volunteers and to draftees.

Anyway it is not essential to your petitioner's argument that this Article of War be applicable "of its own force" to selectees, since the terms of this Article are explicitly invoked by Mobilization Regulation 1-7, Paragraph 13e (1), which regulation definitely does apply to selectees.

The respondent further contends that the oath requirement of Article of War 109 "by its terms presupposes that the taker is already a soldier." This contention, conflicting with the Supreme Court ruling in the Case of *U. S. v. John Grimley* (137 U. S. 636), is evidently based solely upon the fact that the word "soldier" is used in the Article of War in question. This Article reads as follows:

Art. 109. *Oath of Enlistment*—At the time of his enlistment every soldier shall take the following oath or affirmation: "I, _____, do solemnly

swear (or affirm) that I will bear true faith and allegiance to the United States of America; that I will serve them honestly and faithfully against all their enemies whomsoever; and that I will obey the orders of the President of the United States and the orders of the officers appointed over me, according to the rules and Articles of War." This oath or affirmation may be taken before any officer.

The fact that the word "soldier" is used in this article is no proof of the respondent's contention. The Constitution provides that the "President" shall take an inaugural oath, but that does not mean that he is already the President before he takes the oath. The country does not have two Presidents at the same time. Before the President-to-be takes the oath he is the President-elect. As the President-elect takes the oath he becomes the President and simultaneously, his predecessor ceases to be President and becomes ex-President.

Furthermore the above mentioned Article of War is entitled, not "Post Enlistment Oath," but "Oath of Enlistment," and it is prescribed that the oath be taken not "after enlistment," but "at the time of enlistment." It will also be noted that in the latter part of the oath itself, the taker formally binds himself with the obligations of a soldier. Prior to binding himself thus it must be presumed that the taker had the rights and status of a civilian. Just as a man does not become a husband before he takes the marriage vow so a civilian does not become a soldier until he is "sworn into the army."

If any further proof of the untenability of the respondent's contention on this point were needed, it is to be found in the unequivocal language used by the Court in the case of *U. S. v. John Grimley* (137 U. S. 636), where it was held that

The taking of the oath of allegiance is the pivotal fact which changes the status of the recruit from that of civilian to that of soldier.

The respondent's argument continues with the statement that

War Department Mobilization Regulation No. 1-7, Paragraph 13e (4), expressly covers the contingency of a selectee's refusal to take the oath asked of him under this regulation.

The regulation "covers" this contingency all right, but not in the way implied by the respondent's argument. The relevant part of Mobilization Regulation 1-7, Paragraph 13e, read as follows:

(e) *Induction Ceremony*

All men successfully passing the physical examination will be immediately inducted into the Army. The induction will be performed by an officer in a short ceremony in which the men are administered the oath, Article of War 109:

(4) They will be informed that they are now members of the Army of the United States and given an explanation of the obligations and privileges. In the event of refusal to take the oath (or affirmation) of allegiance by a declarant alien or citizen he will not be required to receive it but will be informed that this action does not alter in any respect his obligation to the United States.

It will be noted that section (1) of this provides that the men shall be "inducted" (i. e., led, taking the steps themselves, not dragged) into the Army in a ceremony in which they are administered (not just read) the oath, "Article of War 109." And it will be recalled that this Article, the terms of which are specifically invoked, prescribes that every man shall "take" this oath at the time of enlistment and that according to the ruling in the case of *U. S. v. John Grimley* (137 U. S. 636), it is the taking of the oath, not the reading of it by somebody else, that changes the status of a man from that of a civilian to that of soldier.

"They" used in section (4) of the above quoted regulation, clearly refers to the men to whom the oath has been administered in accordance with the provisions of section (1) and of Article of War 109 the terms of which section (1) explicitly invokes. "They" to whom the oath has been administered in accordance with these provisions and who by "taking" the oath have, under the ruling in the Grimley case, changed from the status of civilian to that of soldier—they are informed that they are now members of the Army.

But he to whom (because he has refused to take it) the oath has not been administered in accordance with the provisions of section (1) of the Regulation and of Article of War 109, he who has refused to be led (inducted) into the Army, refused to take the step which (according to the Grimley ruling) would have made him a soldier—He is informed, not that he is now a member of the Army, but only that his refusal "does not alter in any respect his obligation to the United States." Precisely the same information could be given to a man who, having put his resources beyond the reach of the government, refused to pay his federal taxes. His refusal to pay them "does not alter in any respect his obligation to the United States" and he may therefore be tried by the civil courts and imprisoned for refusing to pay the taxes. Likewise a man who refused to stop at a stop sign might be informed that this did not alter in any respect his obligation to stop and that since it was compulsory to stop, he would be subject to a ten dollar fine, or five days in jail, or both, for refusing to do so. For like reason your petitioner, who did not report for induction and refused to be inducted (led) into the Army and to take the oath of induction, should, under the provisions of Section 11 of the Selective Training and Service Act, be tried by civil courts and imprisoned for one of these offenses.

To read into Mobilization Regulation 1-7, paragraph 3, what the respondent contends is arbitrarily to read into it something which simply is not there and which, even

if it had been there, would have been both unconstitutional and in conflict with the intent of Section 11 of the Act in pursuance of which the regulation was issued.

By way of the irrelevant or unsustainable contentions which have thus far been considered here, the respondent's argument reaches the conclusion (pp. 9 and 10) that "all the steps prescribed by statute, and by regulations having the force of law," having been strictly taken in the present case, petitioner therefore was legally inducted." Deprived of the support of his preceding contentions the respondent's conclusion falls of its own weight, and no further disposition of it is required. With the fall of this conclusion, its corollary (p. 10) that "petitioner is subject to military jurisdiction" also collapses and the respondent's further contention—that petitioner "is not being kept in confinement for any act committed prior to induction, but for his continuing refusal to obey a lawful military command to be fingerprinted"—is refuted (Not having been legally inducted even yet, your petitioner is being held for an act committed "prior to" induction, for his continuing refusal to obey an *unlawful* military command to be fingerprinted).

In the last paragraph of his argument respondent contends:

"The exact moment at which, after (petitioner) reported at the induction center, restraint was first placed on his person is immaterial."

This is as unsustainable as any of the previously considered contentions of the respondent. For at least two reasons it is important to note that, **EVEN ACCORDING TO THE RULING OF THE CIRCUIT COURT (R. 55), PETITIONER HAD NOT BEEN "ACTUALLY INDUCTED" AT THE TIME WHEN THE ARMY PUT HIM UNDER ARREST** [to keep him from leaving before the "induction ceremony" and from turning himself over to the civil authorities for arrest and imprisonment for re-

fusal to report for induction (R. 21)]. This fact is important first because the purpose of the legal provision prohibiting the courtmartial of a selectee who has not been "actually inducted" into the Army would obviously be defeated if the Army could arrest a selectee *whom it was specifically prohibited, at the time of the arrest, from courtmartialling*, and, by its unilateral act, against his protest, subject the selectee to a process ("induction") which would permit the Army to courtmartial him.

This fact is important, in the second place, because it clearly refutes any assertion to the effect that that petitioner "reported for induction." How, in the face of this fact respondent can maintain (p. 10) that "a sufficient answer to (petitioner's) contention that he did not report for induction is that he reported at the induction center" is more than your petitioner can see. If petitioner really had reported "for induction" at the reception center, it surely would have been quite unnecessary to put him under arrest to keep him from leaving before the scheduled induction, unnecessary to keep him from turning himself over to the civil authorities for arrest and imprisonment for refusal to report for induction.

The respondent's contention to the effect that "reporting" at the induction center (in fact solely for a physical examination) constitutes "reporting for induction" is refuted even by his own previous statement (pp. 7 and 8) to the effect that taking the physical examination and being found acceptable constituted a "condition precedent to" (hence not a part of) induction. The physical examination being a separate and distinct process from induction it is obviously possible to report for the one without reporting for the other. *It is a mere geographical accident that, in the case of soldiers, physical examination and induction both take place on the same reservation. In the case of sailors the physical examination takes place at Ft. Leavenworth but the men are taken to Kansas City to be inducted or "sworn" into the Navy.*

The absurdity of the respondent's contention that petitioner "reported for induction" just because petitioner in fact "reported at the induction center" for a physical examination may be demonstrated in still another way: Suppose that there were no draft and that, instead of, an "induction center," there were an "enlistment center" on the Ft. Leavenworth military reservation. Suppose further that it was provided by Act of Congress that "the Army shall be empowered immediately to induct all persons reporting for enlistment at an enlistment center." Could the Army, under the provisions of such an Act, legally "induct" a man who "reported at the enlistment center," say for work on the telephone system, in spite of the man's denial that he had reported for enlistment and of his refusal to submit to induction? Of course not! *Reporting at an induction center does not constitute reporting for induction unless there is an intent on the part of the person reporting to report for induction.* Respondent concedes in his statement of the facts (pp. 3 and 4) that petitioner had no such intent.

It might here be noted again that on March 3 of this year a case involving the question of whether or not reporting at an induction center constituted reporting for induction was decided in the United States District Court for the Southern District of New York. In this case, *United States v. John Angelo Collura* (not yet reported) a selectee named John Angelo Collura was indicted on a charge of "refusing to report for induction." In his defense Collura contended that he had reported for induction. The facts were that Collura had reported at an induction center but had balked as soon as it became evident to him that he would be vaccinated. Then he refused to go any further unless the Army would guarantee not to vaccinate him, but expressed his willingness to submit to induction provided the Army would give such guarantee. Collura was found guilty of "refusing to report for induction" and sentenced by Judge Henry W. Goddard

to 3 years in prison (The case has been appealed but the Circuit Court of Appeals has not yet handed down a decision).

If even the conditional refusal of Collura to submit to induction, after he had reported at the induction center, was punishable in a civil court then your petitioner's *unconditional* refusal to submit to induction ought surely to be. It matters not whether the charge be refusal to report for induction or refusal to submit to induction, either of these charges would be correct.

The respondent states that your petitioner, arriving at the induction center, "obviously did not remain free of the military power of restraint to prevent his leaving." But the question is whether petitioner should not have remained free of such restraint, particularly in view of the fact that it was his purpose to turn himself over to the civil authorities for arrest and imprisonment for refusal to report for induction—to the civil authorities under whose jurisdiction he still was at the time of his arrest, by the military authorities (R. 21, 29; and Section 11 of the Selective Training and Service Act), even under the Circuit Court's ruling as to when "induction was completed" (R. 55). Perhaps the respondent seeks by the statement quoted to back up the assertion of Captain Milligan, recorded in the transcript of testimony, that as soon as your petitioner entered the military reservation, he entered military jurisdiction (R. 21). Of course the Captain's statement was in a limited sense correct, just as (reverting to a previous analogy) it would have been in a limited sense correct to say that even under the old extraterritorial treaties an American citizen entered Chinese jurisdiction as soon as he entered China. But the Captain's assertion was not correct in any sense relevant to this case for, just as the old extraterritorial treaties prohibited the trial of an American by Chinese courts, unless the American had actually become a citizen of China, so the Selective Training and Service Act prohibits the

trial of a selectee by court martial unless the selectee has been "actually inducted" into the Army. Suppose to vary our previous analogy slightly, that the Chinese government, under the old extraterritorial treaties, had arrested an American citizen in Peking who had refused to take upon himself the obligations of Chinese citizenship and thereby to renounce his rights as an American citizen, and by its unilateral act, against the American's unceasing protest, had "naturalized" him a Chinese citizen and had then given him an order to put his fingerprints on records which might make it appear that he had taken on the obligations of Chinese citizenship, an order which the American had refused to obey. It would have been absurd for the Chinese Government to assert that the American was not being kept in confinement for any act committed prior to his "naturalization," but for his continued refusal to obey a lawful Chinese command to be fingerprinted, and it is just as absurd for the Army to assert (page 10 of respondent's certiorari brief) that your petitioner "is not being held for any act committed prior to induction, but for his continued refusal to obey a lawful military order to be fingerprinted." The Chinese government, in the former instance, would obviously have violated the terms of the extraterritorial treaty, and the Army in the latter instance has just as obviously violated the terms of the Selective Training and Service Act.

The concluding sentence of the argument of the Brief for the Respondent in Opposition merely summarizes the previous contentions and adds nothing new.

Petitioner would respectfully submit that in the foregoing reply to the respondent's argument it has been conclusively demonstrated that the respondent's position in this case is legally and logically untenable.

In the concluding footnote of the respondent's brief it is contended that the issue of petitioner's draft classifi-

cation is not properly before the Court. Perhaps the contention is correct. That is for the Court to decide. Although the fact that petitioner is an objector, was mentioned (R. 6) in his reply to the respondent's return to the Writ of Habeas Corpus, improper draft classification was not presented to the District Court as a legal ground for the grant of the writ. Petitioner was not at the time aware that his classification might be subject to review in the court.

[As a matter of fact petitioner would never have raised the issue at all if the Army had allowed him to turn himself over to the civil authorities for arrest and imprisonment for refusal to report for induction—he would not have raised it because he was in a way glad that his classification had put his principles to the acid test and left him no alternative but to submit to induction into a non-combatant branch of the Army or to stand by his pacifistic guns and to register his protest against war and conscription by deliberately refusing to submit to induction, and taking the consequences. But a new element was introduced into the situation by the Army's high-handed action and by the fact that the District and Circuit Courts, instead of supporting petitioner's claim to the right to be tried and punished as a civilian by the civil courts, upheld the Army's claim that it had "lawfully inducted" petitioner (simply by arresting him without a warrant, reading the oath of induction in his presence, and telling him when he refused to take it "That doesn't make any difference, you are in the Army now") and, by implication, the further claim that the Army could court-martial petitioner as if he were a soldier, not for his real offense of refusing to be inducted into or to serve in the Army, but on the trifling and misleading charge of refusing to submit to fingerprinting (misleading because petitioner would have no objection at all to submitting to finger printing if this did not involve obeying military orders as if he were a soldier). So, upon learning of the ruling in the case of *United States ex rel.*

Phillips v. Col. Downer, your petitioner—although remaining convinced that the legal grounds presented at the initiation of the habeas corpus proceeding were logically and legally more than sufficient to warrant his release from the hands of the military authorities into the hands of the civil authorities—decided to present the issue of his draft classification to the Supreme Court as a possible supplementary ground for the grant of the writ.]

It may be, as the respondent contends, that the evidence of the record is inadequate for the determination of such an issue. However, the record of petitioner's actions should be more than sufficient to establish that he is a conscientious or sincere objector to war and conscription. [It should be fairly obvious that, when a man has been found physically fit only for non-combattant service (R. 21) and has been given to understand that if he would go into the Army he might soon be a Captain (R. 33-34)—it is not just for the fun of it that he chooses instead: to face prison now and the probable sacrifice of a professional career in the future, to lose his fair-weather friends, to make enemies of some fine people who do not understand his position, and to lay himself open to the sanctionious vituperation of professional patriots.]

As to the question of whether or not it was the intent of Congress to include men like your petitioner in the category of objectors "by reason of religious training and belief," petitioner himself is in doubt. Although petitioner was raised in the Presbyterian Church, the training he received there has had little if anything to do with his present stand. When a student at the University of Kansas he discovered, enthusiastically joined, and became very active in the Humanist branch of the Unitarian Church, but it cannot be said that most of the members or ministers of the Unitarian church are now pacifists. He cannot say exactly where he got the idea, which some people now regard as strange, that, "no government has the right to make him a slave, to make him commit murder" (R. 17);

but he has that conviction, and it seems so very natural to him, that he finds it rather difficult to understand why he should have to demonstrate that he holds such a conviction "by reason of religious training and belief." It is, in your petitioner's view, a sad commentary on the state of human civilization that, in any country, let alone a "Christian" democracy, conscientious objection to war and conscription should be so much the exception rather than the rule, that any individual should ever have to prove he was conscientiously opposed to being forced as a slave to serve as an accomplice in the indiscriminate and wholesale murder and mayhem of fellow human beings who happened to have been born on the wrong side of certain man-made frontiers.

Wherefore, your petitioner would respectfully pray that the decision of the United States District Court of the District of Kansas, First Division, and of the United States Circuit Court of Appeals of the Tenth Circuit be reversed and that your petitioner be discharged from his unlawful confinement.

ARTHUR GOODWYN BILLINGS,
Petitioner.

LEE BOND,
Of Counsel.

APPENDIX

Excerpts from Daniel Webster's Speech on the Conscription Bill

Delivered in the House of Representatives on
December 9, 1814

Mr. Chairman: After the best reflection which I have been able to bestow on the subject of the bill before you, I am of opinion that its principles are not warranted by any provision of the Constitution. It appears to me to partake of the nature of those other propositions for military measures which this session, so fertile in inventions, has produced. It is of the same class with the plan of the Secretary of War; with the bill reported to this House by its own Committee for filling the ranks of the regular army, by classifying the free male population of the United States; and with the resolution recently introduced by an honorable gentleman from Pennsylvania (Mr. Ingersoll), and which now lies on your table, carrying the principle of compulsory service in the regular army to its utmost extent.

This bill indeed is less undisguised in its object, and less direct in its means, than some of the measures proposed. It is an attempt to exercise the power of forcing the free men of this country into the ranks of an army, for the general purposes of war, under color of a military service. To this end it commences with a classification which is no way connected with the general organization of the militia, nor, to my apprehension, included within any of the powers which Congress possesses over them. All the authority which this Government has over the militia, until actually called into its service, is to enact laws for their organization and discipline. This power it has exercised. It now possesses the further

power of calling into its service any portion of the militia of the States, in the particular exigencies for which the Constitution provides, and of governing them during the continuance of such service. Here its authority ceases. The classification of the whole body of the militia, according to the provisions of this bill, is not a measure which respects either their general organization or their discipline. It is a distinct system, introduced for new purposes, and not connected with any power which the Constitution has conferred on Congress.

But, sir, there is another consideration. The services of the men to be raised under this act are not limited to those cases in which alone this Government is entitled to the aid of the militia of the States. These cases are particularly stated in the Constitution, "to repel invasion, suppress insurrection, or execute the laws." But this bill has no limitation in this respect. The usual mode of legislating on the subject is abandoned. The only section which would have confined the service of the militia, proposed to be raised, within the United States has been stricken out; and if the President should not march them into the Provinces of England at the north, or of Spain at the south, it will not be because he is prohibited by any provision in this act.

This, sir, is a bill for calling out the militia, not according to its existing organization, but by draft from new created classes;--not merely for the purpose of "repelling invasion, suppressing insurrection, or executing the laws," but for the general objects of war--for defending ourselves, or invading others, as may be thought expedient;--not for a sudden emergency, or for a short time, but for long stated periods; for two years, if the proposition of the Senate should finally prevail; for one year, if the amendment of the House should be adopted. What is this, sir, but raising a standing army out of the militia by draft, and to be recruited by draft, in like manner, as often as occasion may require?

This bill, then, is not different in principle from the other bills, plans, and resolutions which I have mentioned. The present discussion is properly and necessarily common to them all. It is a discussion, sir, of the last importance. That measures of this nature should be debated at all, in the councils of a free government, is cause of dismay. The question is nothing less than whether the most essential rights of personal liberty shall be surrendered; and despotism embraced in its worst form.

I had hoped, sir, at an early period of the session, to find gentlemen in another temper. . . . If it was not to have been expected that gentlemen would be convinced by argument, it was still not unreasonable to hope that they would listen to the solemn preaching of events. . . . Although they had, last year, given no credit to those who predicted the failure of the campaign against Canada, yet they had seen that failure. . . . They had seen much more than was predicted; for no man had foretold that our means of defence would be so far exhausted in foreign invasion, as to leave the place of our own deliberations insecure, and that we should this day be legislating in view of the crumbling monuments of our national disgrace. No one had anticipated that this city would have fallen before a handful of troops, and that British generals and British admirals would have taken their airings along the Pennsylvania Avenue, while the Government was in full flight, just awaked perhaps from one of its profound meditations on the plan of a conscription for the conquest of Canada. . . .

What is the evidence that the protection of the country is the object principally regarded? . . .

Or shall we look to the acquisition of the professed objects of the war, and there find grounds for approbation and confidence. The professed objects of the war are abandoned in all due form. The contest for sailors' rights

is turned into a negotiation about boundaries and military roads, and the highest hope entertained by any man of the issue, is that we may be able to get out of the war without a cession of territory.

Let us examine the nature and extent of the power which is assumed by the various military measures before us. In the present want of men and money, the Secretary of War has proposed to Congress a military conscription. For the conquest of Canada, the people will not enlist; and if they would, the treasury is exhausted, and they could not be paid. Conscription is chosen as the most promising instrument, both of overcoming reluctance to the service, and of subduing the difficulties which arise from the deficiencies of the exchequer. The administration asserts the right to fill the ranks of the regular army by compulsion. It contends that it may now take one out of every twenty-five men, and any part, or the whole of the rest, whenever its occasions require. Persons thus taken by force, and put into an army, may be compelled to serve there during the war, or for life. They may be put on any service, at home or abroad, for defence or for invasion, according to the will and pleasure of the Government. This power does not grow out of any invasion of the country, or even out of a state of war. It belongs to government at all times, in peace as well as in war, and it is to be exercised under all circumstances, according to its mere discretion. This, sir, is the amount of the principle contended for by the Secretary of War.

Is this, sir, consistent with the character of a free government? Is this civil liberty? Is this the real character of our Constitution? No, sir, indeed it is not. The Constitution is libelled, foully libelled. The people of this country have not established for themselves such a fabric of despotism. They have not purchased at a vast expense of their own treasure and their own blood a Magna Charta to be slaves. Where is it written in the Constitution, in

what article or section is it contained, that you may take children from their parents, and parents from their children, and compel them to fight the battles of any war in which the folly or the wickedness of government may engage it? Under what concealment has this power lain hidden which now for the first time comes forth, with a tremendous and baleful aspect, to trample down and destroy the dearest rights of personal liberty? Who will show me any constitutional injunction which makes it the duty of the American people to surrender everything valuable in life, and even life itself, not when the safety of their country and its liberties may demand the sacrifice, but whenever the purposes of an ambitious and mischievous government may require it? Sir, I almost disdain to go to quotations and references to prove that such an abominable doctrine has no foundation in the Constitution of the country. It is enough to know that that instrument was intended as the basis of a free government, and that the power contended for is incompatible with any notion of personal liberty. An attempt to maintain this doctrine upon the provisions of the Constitution is an exercise of perverse ingenuity to extract slavery from the substance of a free government. It is an attempt to show, by proof and argument, that we ourselves are subjects of despotism, and that we have a right to chains and bondage, firmly secured to us and our children by the provisions of our government. It has been the labor of other men, at other times, to mitigate and reform the powers of government by construction; to support the rights of personal security by every species of favorable and benign interpretation, and thus to infuse a free spirit into governments not friendly in their general structure and formation to public liberty.

The supporters of the measures before us act on the opposite principle. It is their task to raise arbitrary powers, by construction, out of a plain written charter of National Liberty. It is their pleasing duty to free us of the delusion, which we have fondly cherished, that we

are the subjects of a mild, free, and limited government, and to demonstrate by a regular chain of premises and conclusions, that government possesses over us a power more tyrannical, more arbitrary, more dangerous, more allied to blood and murder, more full of every form of mischief, more productive of every sort and degree of misery than has been exercised by any civilized government, with a single exception, in modern times.

The Secretary of War has favored us with an argument on the constitutionality of this power. Those who lament that such doctrines should be supported by the opinion of a high officer of government, may a little abate their regret, when they remember that the same officer, in his last letter of instructions to our ministers abroad, maintained the contrary. In that letter he declares, that even the impressment of seamen, for which many more plausible reasons may be given than for the impressment of soldiers, is repugnant to our Constitution. It might therefore be a sufficient answer to his argument, in the present case, to quote against it the sentiments of its own author, and to place the two opinions before the House, in a state of irreconcilable conflict. Further comment on either might then be properly forborne, until he should be pleased to inform us which he retracted, and to which he adhered. But the importance of the subject may justify a further consideration of the arguments.

Congress having, by the Constitution, a power to raise armies, the secretary contends that no restraint is to be imposed on the exercise of this power, except such, as is expressly stated in the written letter of the instrument. In other words, that Congress may execute its powers, by any means it chooses, unless such means are particularly prohibited. But the general nature and object of the Constitution impose as rigid a restriction on the means of exercising power as could be done by the most explicit injunctions. It is the first principle applicable to such a case, that no construction shall be admitted

which impairs the general nature and character of the instrument. A free constitution of government is to be construed upon free principles, and every branch of its provisions is to receive such an interpretation as is full of its general spirit. No means are to be taken by implication which would strike us absurdly if expressed. And what would have been more absurd than for this Constitution to have said that to secure the great blessings of liberty it gave to government an uncontrolled power of military conscription? Yet such is the absurdity which it is made to exhibit, under the commentary of the Secretary of War.

But it is said that it might happen that an army could not be raised by voluntary enlistment, in which case the power to raise armies would be granted in vain, unless they might be raised by compulsion. If this reasoning could prove anything, it would equally show, that whenever the legitimate power of the Constitution should be so badly administered as to cease to answer the great ends intended by them, such new powers may be assumed or usurped, as any existing administration may deem expedient. This is the result of his own reasoning, to which the secretary does not profess to go. But it is a true result. For if it is to be assumed, that all powers were granted, which might by possibility become necessary, and that government itself is the judge of this possible necessity, then the powers of government are precisely what it chooses they should be. Apply the same reasoning to any other power granted to Congress, and test its accuracy by the result. Congress has power to borrow money. How is it to exercise this power? Is it confined to voluntary loans? There is no express limitation to that effect, and, in the language of the secretary, it might happen, indeed it has happened, that persons could not be found willing to lend. Money might be borrowed then in any other mode. In other words, Congress might resort to a forced loan. It might take the money of any man

by force, and give him in exchange exchequer notes or certificates of stock. Would this be quite constitutional, sir? It is entirely within the reasoning of the secretary, and it is a result of his argument, outraging the rights of individuals in a far less degree than the practical consequences which he himself draws from it. A compulsory loan is not to be compared, in point of enormity, with a compulsory military service.

If the Secretary of War has proved the right of Congress to enact a law enforcing a draft of men out of the militia into the regular army, he will at any time be able to prove, quite as clearly, that Congress has power to create a Dictator. The arguments which have helped him in one case, will equally aid him in the other, the same reason of a supposed or possible state necessity, which is urged now, may be repeated then, with equal pertinency and effect.

Sir, in granting Congress the power to raise armies, the people have granted all the means which are ordinary and usual, and which are consistent with the liberties and security of the people themselves, and they have granted no others. To talk about the unlimited power of the Government over the means to execute its authority, is to hold a language which is true only in regard to despotism. The tyranny of arbitrary government consists as much in its means as in its ends; and it would be a ridiculous and absurd constitution which should be less cautious to guard against abuses in the one case than in the other. All the means and instruments which a free government exercises, as well as the ends and objects which it pursues, are to partake of its own essential character, and to be conformed to its genuine spirit. A free government with arbitrary means to administer it is a contradiction; a free government with an uncontrolled power of military conscription, is a solecism, at once the most ridiculous and abominable that ever entered into the head of man.

Sir, I invite the supporters of the measures before you to look to their actual operation. . . . If the war should continue, there will be no escape, and every man's fate and every man's life will come to depend on the issue of the military draft. Who shall describe to you the horror which your orders of conscription shall create in the once happy villages of this country? Who shall describe the distress and anguish which they will spread over those hills and valleys, where men have heretofore been accustomed to labor, and to rest in security and happiness. Anticipate the scene, sir, when the class shall assemble to stand its draft, and to throw the dice for blood. What a group of wives and mothers and sisters, of helpless age and helpless infancy, shall gather round the theatre of this horrible lottery, as if the stroke of death were to fall from heaven before their eyes on a father, a brother, a son, or a husband. And in a majority of cases, sir, it will be the stroke of death. Under present prospects of the continuance of the war, not one half of them on whom your conscription shall fall will ever return to tell the tale of their sufferings. They will perish of disease and pestilence, or they will leave their bones to whiten in fields beyond the frontier. Does the lot fall on the father of a family? His children, already orphans, shall see his face no more. When they behold him for the last time, they shall see him lashed, fettered, and dragged away from his own threshold like a felon and an outlaw. Does it fall on a son, the hope and the staff of aged parents? That hope shall fail them. On that staff they shall lean no longer. They shall not enjoy the happiness of dying before their children. They shall totter to their grave, bereft of their offspring and unwept by any who inherit their blood. Does it fall on a husband? The eyes which watch his parting steps may swim in tears forever. She is a wife no longer. There is no relation so tender or so sacred that by these accursed measures you do not propose to violate it. There is no happiness so perfect that you do not pro-

pose to destroy it. 'Into the paradise of domestic life you enter,' not indeed by temptations and sorceries, but by open force and violence.

Nor is it, sir, for the defense of his own house and home, that he who is the subject of military draft is to perform the task allotted to him. . . . If, sir, in this strife he fall -- if, while ready to obey every rightful command of government, he is forced from his home against right, not to contend for the defense of his country, but to prosecute a miserable and detestable project of invasion, and in that strife he fall, 'tis murder. It may stalk above the cognizance of human law, but in the sight of Heaven it is murder; and though millions of years may roll away, while his ashes and yours lie mingled together in the earth, the day will yet come when his spirit and the spirits of his children must be met at the bar of omnipotent justice. May God, in his compassion, shield me from any participation in the enormity of this guilt.

I would ask, sir, whether the supporters of these measures have well weighed the difficulties of their undertaking. Have they considered whether it will be found easy to execute laws which bear such marks of despotism on their front; and which will be so productive of every sort and degree of misery in their execution? . . . The operation of measures thus unconstitutional and illegal, ought to be prevented by a resort to other measures which are both constitutional and legal. It will be the solemn duty of the State Governments to protect their own authority over their own militia, and to interpose between their citizens and arbitrary power. These are among the objects for which the State Governments exist; and their highest obligations bind them to the preservation of their own rights and the liberties of their people. I express these sentiments here, sir, because I shall express them to my constituents. Both they and myself live under a constitution which teaches us that "the doctrine of non-re-

sistance against arbitrary power and oppression is absurd, slavish, and destructive of the good and happiness of mankind."* With the same earnestness with which I now exhort you to forbear from these measures, I shall exhort them to exercise their unquestionable right of providing for the security of their own liberties.

In my opinion, sir, the sentiments of the free population of this country are greatly mistaken here. The nation is not yet in a temper to submit to conscription. The people have too fresh and strong a feeling of the blessings of civil liberty to be willing thus to surrender it. You may talk to them as much as you please, of the victory and glory to be obtained in the enemy's provinces; they will hold these objects in light estimation if the means be a forced military service. You may sing to them the song of Canada Conquest in all its variety, but they will not be charmed out of the remembrance of their substantial interests and true happiness. Similar pretences, they know, are the grave in which the liberties of other nations have been buried, and they will take warning. . . .

Those who cry out that the Union is in danger are themselves the authors of that danger. They put its existence to hazard by measures of violence, which it is not capable of enduring. They talk of dangerous designs against the Government, when they are overthrowing the fabric from its foundations. They alone, sir, are friends to the Union of the states, who endeavor to maintain the principles of civil liberty, in the country, and to preserve the spirit in which the Union was framed.

(From *The Writings and Speeches of Daniel Webster*; Little, Brown & Co., Boston, 1903; Volume 14, pages 55-69. The New Hampshire Historical Society has the original manuscript in Mr. Webster's handwriting.)

*N. H. Bill of Rights.